

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 Civil No. 07-cv-12062-MLW

4
5
6 UNITED STATES OF AMERICA,
7 Petitioner

8 vs.

9 ANDREW M. SWARM,
10 Respondent

11
12 *****

13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15
16 18:4248(a) Commitment of Sexually Dangerous Person

17
18 United States District Court
19 District of Massachusetts (Boston.)
20 One Courthouse Way
21 Boston, Massachusetts 02210
22 Monday, January 10, 2011

23 *****

24 REPORTER: RICHARD H. ROMANOW, RPR
25 Official Court Reporter
United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
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1 P R O C E E D I N G S

2 (Begins, 9:00 a.m.)

3 THE CLERK: This is Civil Action Number
4 07-12062, the United States vs. Andrew Swarm. The Court
5 is in session. You may be seated.

6 THE COURT: Good morning. Would counsel
7 please identify themselves for the Court and for the
8 record.

9 MS. CONNOLLY: Rosemary Connolly for the
10 United States of America.

11 MS. PIEMONTE-STACEY: Good morning, your
12 Honor. Eve Piemonte-Stacey for the United States.

13 MR. WATKINS: Good morning, your Honor. Tim
14 Watkins, Federal Public Defender's Office. Ian Gold is
15 with me at counsel table.

16 THE COURT: All right. I'm told that
17 Mr. Swarm's delayed in delivery, but we're not going to
18 start immediately by taking testimony, and given the
19 limited availability usually of the expert's time, I'd
20 like to go over some of these legal issues before we get
21 Mr. Swarm.

22 Is that acceptable, Mr. Watkins?

23 MR. WATKINS: That's fine, your Honor.

24 (Pause.)

25 THE COURT: All right. Did you each receive

1 Dr. Saleh's supplemental report yesterday?

2 MS. CONNOLLY: Yes, your Honor.

3 MR. WATKINS: Yes, your Honor.

4 THE COURT: The Government pointed out to
5 Mr. O'Leary something that I noticed, that he didn't, as
6 ordered back in October, address the implications of the
7 Bureau of Prisons' guidelines on pharmacological
8 treatment. There's something else that he didn't
9 address and it's understandable, I think, because when
10 he was originally appointed this issue hadn't been in
11 sharp focus for me and perhaps for counsel, and that is
12 the implications of the conditions of supervised
13 release.

14 As I read Dr. Saleh's report, he is of the view
15 that Mr. Swarm will be sexually dangerous to the extent
16 he's untreated, but he didn't address the conditions of
17 supervised -- well, he also assumed that Mr. Swarm would
18 have free access to prepubescent children. The
19 conditions of supervised release prohibit that, as I
20 read them, "permit probation to prescribe home detention
21 full time and require participation in a sex offender
22 treatment program."

23 So my present inclination is to issue an order
24 this afternoon to Dr. Saleh telling him to be prepared
25 to address in his testimony these two issues, because he

1 may testify as soon as tomorrow. So I don't know that a
2 supplementary report is something out of order.

3 But what's your thinking on that?

4 MR. WATKINS: Perhaps I'll go first, your
5 Honor. There are two issues there. First, the
6 pharmacological report. I think that is something that
7 I think Dr. Saleh should at least be aware of that is
8 coming up during his testimony. As the Court may
9 recall, I've actually responded or requested that those
10 -- that that policy go to Dr. Saleh as well as
11 Dr. Mills. So I think that truly would be a surprise.

12 I think there is no need for a supplemental report
13 as far as the conditions. We touched on it during the
14 deposition. I think Dr. Saleh will be ready to
15 testify. Now, whether a short order to the doctor to
16 let him know and remind him that, indeed, we're both
17 going to be requesting that and perhaps the Court's
18 requesting that --

19 THE COURT: But this -- it's hard for me, you
20 know, not to look at the Federal Public Defender's
21 Office and remember I'm not conducting a criminal trial,
22 but I'm not, and, you know, I think we have a shared
23 interest in getting out the information that's necessary
24 for the parties to make fully-informed decisions on the
25 positions they want to advocate and for me to decide

1 what I need to decide. Um, Dr. Mills touches, I think,
2 on these things. I believe he expressed the view that
3 treatment in the community was likely to be more
4 promising than treatment in prison, for example. But I
5 want to be as transparent as possible. This is
6 important for me, in my current conception, which may
7 evolve.

8 But, one, there's 4 years and 8 months, I think,
9 of supervised release that you agree hasn't started
10 running yet. So if Mr. Swarm is released, he's on
11 supervised release, he's subject to home detention or
12 inpatient treatment, and is required -- I think the
13 second version that can be amplified, of the conditions
14 of supervised release, say to "participate" in a
15 program, don't say to "complete" a program, but I think
16 it's the same thing. But, you know, in the opinion of
17 these experts, would he have serious difficulty in
18 refraining while he's on supervised release? If he
19 successfully completes the program -- a program, you
20 know, what's their prediction of his danger after that
21 including when he's off the supervised release? These
22 are questions that I have at the moment. And I think
23 I'm going to want to hear from a probation officer --

24 What is it, the Northern District of New York or
25 the Western District of New York?

1 MS. CONNOLLY: I believe it's the Northern
2 District, your Honor.

3 THE COURT: -- because I think the Government
4 is right that I should focus on the existing conditions
5 of release, of supervised release, but they could change
6 before I end this trial. If Mr. Swarm is agreeable to
7 some pharmacological treatment as a condition of
8 supervised release, you know, the probation office --
9 I'd like to know from the probation office in New York,
10 you know (a) whether they -- whether it would be
11 agreeable and (b) you know, do they have programs they
12 could put him in or what kind of program would they put
13 him in?

14 MS. CONNOLLY: Your Honor, if I may address
15 the pharmacological issue?

16 One thing that I detected in both Dr. Mills' and
17 Dr. Saleh's report is that everyone is making an
18 assumption or they haven't really -- um, they're basing
19 an assumption on whether or not he would actually be a
20 suitable candidate for pharmacological treatment. And I
21 think there has to be a medical workup between his
22 thyroid condition and his diabetes to see if he could
23 even withstand this kind of a program.

24 THE COURT: I think Dr. Mills expressed the
25 view that he could not or that he wasn't a good

1 candidate.

2 MS. CONNOLLY: That's exactly what he said and
3 Dr. Saleh just said "suffice it to say, assume he is."
4 So I think it's almost speculative to say whether or not
5 pharmacological treatment could be a condition of
6 supervised release or any treatment.

7 THE COURT: Well, my view, at the moment, is
8 that we don't know.

9 MS. CONNOLLY: Exactly.

10 THE COURT: This is why I want to have this
11 colloquy with you because I would like this developed in
12 the evidence, um, Dr. Mills' view, Dr. Saleh's view, and
13 it's -- you know, it's conceivable to me that if
14 Dr. Mills goes back to California, that we might do it
15 on the telephone. You know, if something comes back
16 from the probation department that more information will
17 be helpful on, um -- well, I want that information. But
18 it couldn't -- I think I have to -- the conditions of
19 supervised release have to be feasible.

20 MS. CONNOLLY: Correct.

21 THE COURT: I'm not going to order something
22 or rely on something that can't be done. And we'll get
23 to this in a moment, but --

24 All right. So I want you and Dr. Mills to
25 question about, in more detail, the implications of the

1 conditions of supervised release and the sort of
2 eligibility for pharmacological treatment, and I'm going
3 to have to be educated on what "pharmacological
4 treatment" means. Are these shots or something that one
5 gets indefinitely or -- you know, at one time there was
6 a discussion about something called "chemical
7 castration" which communicated to me, you know, some
8 sort of permanent effect from the treatment.

9 MR. WATKINS: I think that's certainly what we
10 intended. I should just alert the Court that Dr. Saleh,
11 that that's a particular area of expertise for him, that
12 he is indeed an M.D., a psychiatrist, and he talks about
13 that in great length. I was trying to get his CV up,
14 but I think he's written articles concerning chemical
15 treatment.

16 So while I do expect to speak with Dr. Mills a
17 little bit, I don't think that he has a lot of
18 experience with that. You might hear more when
19 Dr. Saleh comes. Which is why there were particular --
20 at least I was particularly interested in having
21 Dr. Saleh take a look at the BOP's pharmacological
22 guidelines and kind of set them against what he knows.

23 THE COURT: All right. So I'll issue that
24 order after court today.

25 Another legal question that came to mind as I was

1 reading your trial briefs that I'll mention to you.

2 Mr. Swarm has a conviction for -- a state conviction for
3 actually abusing a minor and his felony conviction was
4 for possession of child pornography. I've discussed the
5 legal framework that I intend to apply here, in
6 **Wilkinson**, and I had to figure it out for myself, and
7 that's my present state of mind. So I think he has a
8 qualifying conviction.

9 It's an open question in my mind, as a matter of
10 law, as well as a matter of fact, whether possession of
11 child pornography or the risk of a future possession of
12 child pornography could be the required sexually violent
13 conduct for child molestation. I think some of the
14 cases in this district have treated a conviction for
15 possession of child pornography as sexually violent
16 conduct qualifying somebody for the Adam Walsh Act.

17 I wonder if it should be treated, you know,
18 categorically. I mean, if the testimony is that he is
19 at high risk of looking at this illegal stuff again, is
20 that legally sufficient to prove? Does it have to be
21 something involving actual -- does he have to be at a
22 high risk of actually doing something violent?

23 MR. WATKINS: There's two questions there and
24 the first one is whether possession of child pornography
25 is a qualifying conviction? I may be speaking out of

1 turn, but I know we looked at this, now years ago, at
2 the beginning of the litigation in all SDP cases. I'm
3 fairly certain the conclusion we came to is, "Yes, it
4 is." I think it probably flows from the fact that
5 Congress has delineated possession of child porn as a
6 crime of violence, oddly enough, for purposes of the
7 bail statute particularly and for purposes of a number
8 of other statutes. I think because of that -- and
9 again, I'm just trying to remember how we came to the
10 conclusion that there wasn't really a fight there. Um,
11 I believe from that flows the fact that it is a
12 qualifying conviction for purposes of the Adam Walsh
13 Act. And we're not disputing that at this point.

14 THE COURT: Well -- but my point's -- that's
15 not a material point, I don't think, because you do
16 agree that he qualifies for analysis under the Adam
17 Walsh Act and, in my view, he would even if he didn't
18 have a federal conviction for possession of child
19 pornography because he has a state conviction for abuse
20 and he's admitted some things as well and you don't even
21 need a conviction. But then go around, you know, to the
22 ultimate question, um, that there has to be clear and
23 convincing evidence that he will have substantial
24 difficulty in refraining from sexually violent conduct
25 or child molestation, I think is what the statute says,

1 and at this point, not having heard the evidence, I'm
2 wondering whether it would be sufficient for the
3 government to prove just that he would have substantial
4 difficulty in refraining from looking at child
5 pornography as opposed to touching somebody again?

6 MR. WATKINS: It's an interesting question. I
7 don't think that the Government has gone down that
8 particular route. I think they're throwing it all in,
9 um, a wider basket than that.

10 I should note that, as part of the conditions of
11 release, certainly he doesn't have access, unauthorized
12 access to a computer, and as the Court knows, probation
13 has become very, very good at enforcing those kinds of
14 conditions through a variety of tools.

15 THE COURT: Does the Government anticipate
16 arguing that it would be sufficient to prove only that
17 he's -- that he'll have substantial difficulty in
18 refraining from looking at child pornography?

19 MS. PIEMONTE-STACEY: We don't anticipate
20 making that argument, your Honor. In addition to the
21 child porn, we expect the evidence will show that he's
22 at risk to actually molest children if released.

23 THE COURT: All right.

24 So the first two witnesses are going to be
25 Dr. Mills and Dr. Saleh.

1 MS. CONNOLLY: No, your Honor. Dr. Saleh is
2 Wednesday. Dr. Mills is Monday. Mr. Michael Pierce
3 from the probation office and --

4 THE COURT: Why is Dr. -- did we agree on this
5 back in December?

6 MS. PIEMONTE-STACEY: I don't think Dr. Saleh
7 is available on the 11th.

8 THE COURT: Oh, is that right?

9 MS. PIEMONTE-STACEY: He had informed the
10 Court that he was under a subpoena in another court on
11 the 11th.

12 THE COURT: All right. Thank you. I missed
13 that.

14 So we're going to hear from Dr. Mills and then who
15 is going to be the next witness?

16 MS. CONNOLLY: Michael Pierce, a probation
17 officer from the Northern District of New York, and then
18 depending on --

19 THE COURT: And he will be here in person?

20 MS. CONNOLLY: Yes, he will be here in
21 person. And then depending on time, Dr. Ferraro, who
22 had done the precertification examination at Devens back
23 in 2006 -- 2007.

24 THE COURT: All right. And what will be the
25 essence of Dr. Ferraro's testimony?

1 MS. CONNOLLY: The essence of her opinion will
2 be that she certified him as sexually dangerous.

3 THE COURT: Well, I don't know if I'm going to
4 let her give that opinion. Um, I think this is
5 contested. If he made certain admissions, his
6 statements may come in.

7 MS. CONNOLLY: Yes. And she did have an
8 interview with him and took admissions from him and
9 wrote them into her report.

10 THE COURT: Right, but she's not --

11 MS. CONNOLLY: She's not offering expert
12 testimony, your Honor, no.

13 THE COURT: All right. So she's --

14 MS. CONNOLLY: It's a factual -- it's a
15 factual witness based on her interviews and interaction
16 with Mr. Swarm.

17 THE COURT: And is there an objection to her
18 giving that testimony?

19 MR. WATKINS: No, your Honor. I would expect
20 it to be fairly short. I told the Government I'm
21 willing to stipulate to that part of her report which
22 includes those statements, but they've indicated they
23 want her as a live witness. I suppose that's their
24 prerogative. But I do expect to be fairly quick with
25 her.

1 THE COURT: The Supreme Court in *Old Chief*
2 said that the parties don't have to rely on
3 stipulations, but if it's quick, it's okay.

4 All right. So the witnesses are Mills -- please
5 tell me the probation officer's name again?

6 MS. CONNOLLY: I'm sorry. Michael Pierce.

7 THE COURT: Pierce, tomorrow.

8 MS. CONNOLLY: And then, I believe on
9 Wednesday, we have Dr. Saleh.

10 THE COURT: Yes.

11 MS. CONNOLLY: Then Sarah Walsh, and that's
12 the video.

13 THE COURT: Remind me of who she is, please?

14 MS. CONNOLLY: Um, Sarah Walsh, is the
15 licensed social worker who treated Mr. Swarm in New York
16 when he was under supervised terms of release. Sarah
17 Walsh, Family and Children's Society. She's the video
18 deponent. And that's on the 13th. And I think that
19 would be the conclusion of the evidence that the
20 Government would offer.

21 THE COURT: Okay. And you think that evidence
22 can be concluded this week? We're not going to sit on
23 Friday. But by the 13th?

24 MS. CONNOLLY: Yes, we would expect to. Yes,
25 your Honor.

1 THE COURT: Okay.

2 MR. WATKINS: Your Honor, I was wondering
3 whether I -- depending on when Mr. Swarm gets here, I'm
4 not sure that Dr. Mills is going to be -- at least for
5 my direct, is going to go longer than this morning,
6 which means we may come up short tomorrow. I'm
7 wondering whether Ms. Walsh might be available to
8 testify by video tomorrow rather than waiting until
9 Thursday?

10 THE COURT: Why doesn't the Government check
11 on that later today, so we can use the time.

12 Okay. And, Mr. Watkins, what's your batting
13 order?

14 MR. WATKINS: Um, after Dr. Saleh testifies,
15 Mr. Swarm and, provisionally, Dr. Hernandez, from the
16 Bureau of Prisons, depending on the Court's inclination
17 to let him testify or not. But it would be the opposite
18 way around, I would prefer to have Mr. Swarm go last,
19 but I'm not terribly wedded to that position because
20 I --

21 THE COURT: Well, my present sense is as
22 follows. I have the renewed request for Dr. Phenix's
23 testimony. It hasn't been mentioned today. It's still
24 my inclination to exclude Dr. Phenix.

25 Does the government still -- in view of -- well,

1 part of the reason the Government was advocating that I
2 hear from Dr. Phenix is you didn't know what Dr. Saleh
3 was going to say. Are you still asking for Dr. Phenix
4 to testify?

5 MS. PIEMONTE-STACEY: Yes, your Honor.

6 THE COURT: Well, I'm going to reserve final
7 judgment on that until after we hear from Dr. Saleh. I
8 continue to think that my analysis in the February 14,
9 2008 decision was correct and that the Adam Walsh Act
10 doesn't -- when it talks about examiners, doesn't
11 contemplate the parties will each have their own
12 experts. I do assume -- I do understand I may be wrong
13 on that.

14 I assume, in any event, that I have the discretion
15 to let her testify, but I haven't been told yet what
16 Dr. Phenix would tell me that Dr. Saleh is not expected
17 to tell me and I've asked a couple of times. As I see,
18 at the moment, it, at most, would be cumulative and I
19 would exclude it as an exercise of discretion under Rule
20 403 both because of unfair prejudice -- the Act doesn't
21 contemplate the Government putting on an expert, for
22 reasons I described in February of 2008 in my written
23 decision, and it would be cumulative, so any probative
24 value -- which I don't discern at the moment, because it
25 hasn't been pointed out to me, um, would be

1 substantially outweighed by the risk of unfair prejudice
2 and waste of time. But the Government, if it wishes,
3 can ask me to focus on that again after I hear from
4 Dr. Saleh.

5 I'm likely to find that the Adam Walsh Act is
6 civil and not unconstitutional because of the difficulty
7 of predicting future dangerousness, but I'll build in
8 some time for you to argue on those remaining aspects of
9 the motion to dismiss.

10 I think it would be helpful to me to have some
11 brief openings. Ordinarily I impose time limits in
12 civil cases based on the estimates. It sounds to me
13 like you've just told me that this should take no more
14 than five four-hour days to try, and usually we take a
15 break. So roughly 20 hours. And I have the discretion
16 to give you more time even on that. So I'll say,
17 provisionally, that you each have ten hours to present
18 your case.

19 But the experts may take longer than you think.
20 This is unfamiliar territory still. So if we go six
21 days and not five, or seven days, I've left enough time
22 for it. Okay? But Mr. O'Leary and Mr. Hohler, who is
23 his successor, and that's why they're both sitting
24 there, um -- and Mr. O'Leary is going to the Court of
25 Appeals, um, they'll let you know how much time you have

1 left on the assumption that you have 10 hours each. But
2 I'll be quite liberal in giving you more time. I really
3 do want to hear all of this.

4 All right.

5 (Mr. Swarm enters.)

6 THE COURT: Okay. Mr. Swarm has arrived.
7 We've just been speaking about legal issues. And,
8 actually, since this isn't a criminal case, he wouldn't
9 have a constitutional right to be present, as I
10 understand it, in any event, but I do want him here.

11 And I would like some brief openings from the
12 parties. The trial briefs were very helpful. But I do
13 want to get focused on this. And then I'd like to go to
14 Dr. Mills.

15 Is there anything I should hear before you make
16 those openings?

17 MS. PIEMONTE-STACEY: No, your Honor.

18 MR. WATKINS: Your Honor, there are a couple
19 of exhibits still in dispute, but I think we can address
20 those as we --

21 THE COURT: Are any of them going to come up
22 with Dr. Mills?

23 MR. WATKINS: I don't believe so, no.

24 THE COURT: All right. We'll talk about
25 those. I -- at the moment I don't believe -- I think

1 it's the SORA exhibit that's offered under Rule 8038 and
2 201, is that right? I don't believe it's admissible
3 under either of those rules of evidence, for reasons
4 I'll explain, and I'll give you a chance to be heard on
5 it.

6 What's the other? Okay, the others are not going
7 to come up with Dr. Mills. We'll get to them.

8 MS. CONNOLLY: Your Honor, just one
9 housekeeping matter. To the extent the parties agreed
10 to 35 exhibits so far, may they be moved into evidence,
11 Exhibits 1 through 35?

12 THE COURT: Yes.

13 (Pause.)

14 THE COURT: There's now 36?

15 MS. CONNOLLY: Well, 36 is going to be the
16 updated CV of Dr. Mills and 37 will be the updated
17 resume or CV of Dr. Saleh. But we don't have those
18 yet. We're hoping they're going to bring those with
19 them.

20 THE COURT: All right. 1 to 35 are now
21 admitted.

22 MS. CONNOLLY: Thank you, your Honor.

23 THE COURT: Thank you.

24 (Exhibits 1 through 35, marked.)

25 THE COURT: Okay. We've marked Dr. Mills' as

1 Exhibit 36. Mr. O'Leary obtained it.

2 (Exhibit 36, marked.)

3 THE COURT: All right. Is there something
4 else, Mr. Watkins, before the opening?

5 MR. WATKINS: No, that was what I was going to
6 ask about, is whether we have the CVs yet.

7 THE COURT: All right.

8 The Government has the burden of proof, so, I
9 assume, the government will go first.

10 MS. PIEMONTE-STACEY: Thank you, your Honor.
11 Um, very briefly.

12

13 OPENING STATEMENT BY MS. PIEMONTE-STACEY:

14 Mr. Swarm is a sexually dangerous person, as the
15 evidence will show.

16 (Courtroom lights dim, then return, suddenly.)

17 MS. PIEMONTE-STACEY: I hope that wasn't a
18 sign from above.

19 But, your Honor, he is and remains a sex offender
20 who has never successfully completed sex offender
21 treatment. He was on supervised release in 2007 --

22 THE COURT: I'm sorry to interrupt you, but,
23 again, this is an iterative process. I think it just
24 may have been a misstatement in the Government's trial
25 brief, but I think it's important we not proceed based

1 on a misconception. At one point, um, the Government
2 says, and I think it's on Page 3 of your brief, that
3 Mr. Swarm has been unable or unwilling to successfully
4 complete sex offender treatment.

5 If he's unable -- well, that may be okay with
6 regard to why he didn't complete it, but ultimately I'm
7 going to have to decide whether there's a substantial
8 risk that he's unable to restrain himself and not merely
9 that he's unwilling to. And reading that iteration of
10 the issue prompted me to say that.

11 But, you know, if he's been unwilling to do the
12 treatment, um, I guess that's a historic fact.

13 MS. PIEMONTE-STACEY: It is. It was meant as
14 a historic fact, your Honor. So my apologies if it came
15 off any other way.

16 THE COURT: Well, I probably misconstrued it.
17 But go ahead.

18 MS. PIEMONTE-STACEY: But he was on supervised
19 release and -- after he pled guilty to receipt and
20 possession of child pornography. And one of the terms
21 of his release, conditions of his release was that he
22 stay away from minor children, and he violated that
23 condition knowing -- knowing the harsh results that
24 happen from violating that condition. He was in the
25 presence of small children without supervision. He's

1 then committed and then --

2 THE COURT: What were the facts of that? Was
3 he in the presence of several small children or just
4 one?

5 MS. PIEMONTE-STACEY: There was more than one
6 incident, your Honor, and I think the testimony will
7 show that.

8 THE COURT: Well, what is he going to tell
9 me?

10 MS. PIEMONTE-STACEY: Well, through
11 Mr. Swarm's admissions, but basically he was at a house
12 where -- of a friend where small children were. He was
13 at a wedding and had an interaction with small children
14 in the parking lot. He was at -- it's incidents such as
15 those. Um, those were a couple of examples. And he
16 ultimately admitted being in the presence of these
17 children without the appropriate supervision from
18 probation.

19 So as this Court is well aware, we have to prove
20 the three elements, that he's engaged in or attempted to
21 engage in sexually violent conduct or child molestation
22 in the past, that he suffers from a serious mental
23 illness, abnormality or disorder, and in this case, it's
24 pedophilia, and as a result of -- as well as his
25 personality disorder NOS, and as a result of which he

1 will have serious difficulty in refraining from sexually
2 violent conduct or child molestation if he's released.

3 As to his past acts of child molestation, as the
4 Court heard this morning, there's no dispute. He pled
5 guilty to the receipt and possession of child
6 pornography. In 1994, he was charged with endangering
7 the welfare of a child and attempted sexual abuse. And
8 he pled guilty to attempting to committing both of those
9 crimes. In that case the victim was his 11-year-old
10 step-niece. In 2000, he pled guilty to receipt and
11 possession of child pornography. He was sentenced. He
12 ordered three videos of prepubescent children and they
13 were engaged in hardcore sexual activity with adults.
14 Those children were between the ages of 6 and 9, your
15 Honor. And when a search warrant was executed at his
16 home in connection with the delivery of those three
17 videos, that's when the authorities located over 60
18 marijuana plants as well as more than -- about 300
19 additional images of child pornography involving
20 prepubescent children.

21 Both Dr. Mills and Dr. Saleh have diagnosed
22 Mr. Swarm with pedophilia and personality disorder not
23 otherwise specified. The evidence will show that
24 Mr. Swarm has had this life-long attraction to
25 prepubescent girls and that he hasn't successfully

1 completed sex offender treatment, so he doesn't have the
2 tools to manage this life-long attraction to
3 prepubescent children.

4 People like Mr. Swarm -- and I believe this is in
5 Dr. Mills' report and it will come out in his testimony,
6 but people like Mr. Swarm who have this personality
7 disorder, they fail to conform to social norms by
8 repeatedly performing acts that are grounds for arrest,
9 are deceitful --

10 THE COURT: The personality disorder?

11 MS. PIEMONTE-STACEY: Yes. -- are deceitful,
12 impulsive, with reckless disregard for the safety of
13 others, are consistently irresponsible and possess a
14 lack of remorse. So when you take the paraphilia -- um,
15 the sexual deviance of pedophilia coupled with this
16 personality disorder, we say it is a serious mental
17 illness, abnormality or disorder, the result of which he
18 will be unable to refrain -- I'm sorry, your Honor?

19 THE COURT: A couple of things, and I say this
20 so you can have them in mind when you question the
21 experts, particularly.

22 In my view -- and I know in his report Dr. Mills
23 talks about this, but in my view something can be a
24 mental illness, or in terms of the statute, a mental
25 abnormality and not be severe, but that's a fact -- the

1 severity is a fact to be determined in this proceeding.
2 Do you agree with that?

3 MS. PIEMONTE-STACEY: Yes, your Honor.

4 THE COURT: Okay. So the intensity of it is
5 going to be an issue that I'll need evidence on. I
6 wouldn't -- I'm not inclined to think I should treat
7 pedophilia as categorically as severe a problem. It
8 depends on the circumstances of the particular person.
9 And, as I understand it, you agree with that.

10 In **Wilkinson** I found that antisocial personality
11 disorder generally was not the type of disorder that
12 could subject somebody to civil commitment and I found,
13 in addition, particularly with regard to **Wilkinson**, it
14 wasn't a mental illness that caused him substantial
15 difficulty in refraining, because there I was educated
16 to understand that antisocial personality disorder was
17 more voluntary -- well, it was essentially voluntary
18 cognitively, it wasn't -- it was diagnosed by describing
19 historic behavior, not by -- including crimes that might
20 have been voluntarily committed or committed as a result
21 of drug abuse.

22 Is personality disorder otherwise specified, is it
23 your argument that it alone would be something that
24 qualified or caused Mr. Swarm to be civilly committed or
25 just that, in conjunction with his pedophilia, it

1 magnifies the risk that exists with pedophilia
2 generally?

3 MS. PIEMONTE-STACEY: It's in conjunction with
4 his pedophilia, your Honor. I think, you know, the
5 Court has made its decision clear in terms of the
6 antisocial personality disorder and there's disagreement
7 in the field as between experts as to whether antisocial
8 personality disorder alone is enough. In fact, Dr. Amy
9 Phenix would say it is not, it is not enough.
10 Antisocial alone is not enough.

11 So there's reasonable disagreement in the field.
12 But in this case an untreated or, um, an untreated sex
13 offender who has the sexual deviance of pedophilia,
14 coupled with this personality disorder, um, is what
15 makes it a serious mental illness, abnormality, or
16 disorder in this case.

17 Finally, your Honor, the evidence will show,
18 again, through testimony, through the documents, that
19 Mr. Swarm will have serious difficulty in refraining
20 from sexually violent conduct or child molestation if he
21 is released. He has shown a failure to comply with
22 critical conditions of supervised release. He has
23 reported an ongoing sexual interest in prepubescent
24 girls. He's tried and failed twice at sex offender
25 treatment, outpatient. He blames others for these

1 offenses and he continues to minimize these offenses.
2 He's been noncompliant with therapy, he's been
3 noncompliant with medication.

4 And so, as a result of all these factors, the
5 Government believes it proves by clear and convincing
6 evidence that Mr. Swarm will have serious difficulty
7 refraining from sexually violent conduct or child
8 molestation, if released, and that he remains a sexually
9 dangerous person. Thank you.

10 THE COURT: Thank you.

11 MR. WATKINS: Your Honor, before I get going,
12 I just want to make something clear, because I think
13 we're already getting confused. There's been no
14 diagnosis of Mr. Swarm as having antisocial personality
15 disorder. I think, um, what you're going to get from
16 Dr. Mills is a borderline personality.

17 It is easy for us nonexperts to start bandying
18 about the terms, but those are very, very different
19 things with very, very different indications. I think
20 we'll go through that with Dr. Mills a little more when
21 he testifies, but I think it's prudent to be clear
22 exactly what's going on here, because what Dr. Mills
23 will tell us is that there are a lot of different kinds
24 of personality disorders, some more severe, um, some
25 less severe, all with different facets and this is not

1 antisocial personality disorder. I don't believe either
2 of the experts are going to testify to that.

3
4 OPENING STATEMENT BY MR. WATKINS:

5 Your Honor, the background is that Mr. Swarm grew
6 up in a pretty dysfunctional family as both the experts
7 and the records indicate. That dysfunction left him
8 socially awkward, really having difficulty connecting
9 with peers his own age, particularly girls, while he was
10 in high school. And that's reflected in his first
11 sexual experience, while a senior in high school he got
12 involved in a relationship with a younger girl, 13 years
13 old at the time that they began experimenting with sex,
14 um, and it's certainly irresponsible and certainly very,
15 very troubling given the age --

16 THE COURT: Excuse me just a minute. As you
17 know, it's not my regular courtroom. Something is
18 happening with my chair.

19 (Pause.)

20 THE COURT: Go ahead.

21 MR. WATKINS: -- it's certainly very troubling
22 given the age difference, but notwithstanding that
23 troubling aspect, it does appear that this relationship
24 was quite mutual, it wasn't the kinds of grooming and
25 predatory kinds of behavior that we sometimes think of

1 when we talk about child molestation. And indeed this
2 particular relationship appears to have been condoned by
3 his peers in the community in which they lived.

4 That relationship went on for a period of time
5 into Mr. Swarm's early 20s and into the woman's late
6 teens, but it did break up. It left Mr. Swarm quite
7 emotionally devastated. And you're going to hear about
8 some of the nonsexual offenses in his early 20s, acting
9 out, public drunkenness, things of that nature, and some
10 of the things that flow from that. What his upbringing
11 and that relationship left him with was a difficulty in
12 making emotional bonds with people, and particularly
13 with other women.

14 At age 30, that really did reach a crisis point
15 when he made an emotional connection with a step-niece
16 for whom he was baby-sitting. She was far too young to
17 get involved in any kind of relationship, nevertheless
18 there was an emotional connection, and Mr. Swarm
19 struggled with that connection and the implications of
20 what it meant and particularly the kinds of sexual
21 feelings that he began and recognized were quite wrong.

22 What he did on that occasion and what you're going
23 to hear during trial is a man who always struggles with
24 these kinds of feelings and also is able to take
25 measures, many of them measures that we would not take

1 or we can question, but measures that he took to
2 sabotage and make sure that, um, sexual conduct did not
3 take place.

4 THE COURT: And some examples are?

5 MR. WATKINS: Well, in 1994, for example, the
6 government talked about that being molestation, but
7 actually what he pled to, the Court will hear, are two
8 counts of attempted sexual abuse and attempted
9 endangerment of a child, all stemming from the same
10 incident. The reason it's charged as attempt is because
11 Mr. Swarm went up to the girl, gave her a note, a fairly
12 specific note saying "I have these feelings for you,
13 they're wrong feelings and I'm worried about them, and I
14 don't think I should be around you anymore. I want you
15 to give this note to your parents so that they
16 understand what's going on here. I don't know what else
17 to do." And indeed that's what happened, the note went
18 to the parents, the parents went to the police. So this
19 was really -- and I should say that Mr. Swarm admitted
20 to the police and explained exactly what was going on,
21 exactly why he had written the note and did take
22 efforts, in fact, to sabotage it.

23 And that is really the pattern of what you're
24 going to hear. There's no allegation here that there's
25 the kinds of penetration or the kinds of production of

1 child pornography, things of that nature, very
2 predatory-kinds of acts here. What happens is that
3 Mr. Swarm makes an emotional connection, recognizes the
4 connection, and then takes steps, albeit steps that, at
5 least at the time, were not the best steps or even good
6 steps to take, but steps to minimize and to ameliorate
7 any kind of damage that he might cause, and indeed to
8 sabotage himself.

9 And he was often successful, sometimes not so
10 much, but he was successful at battling these feelings
11 that he had and, um, the difficulty in making emotional
12 connections. He did go to therapy. He did -- he was
13 able to find tools from therapy in order to help himself
14 over the years.

15 One of the things that he did -- and, again, it's
16 troubling, but it is a fact, was thinking that having
17 another release would be a helpful tool for him to avoid
18 getting the emotional contact and into, um, difficult
19 situations, um, is he turned to a collection of child
20 pornography -- and this was in addition to adult
21 pornography that he had on the computer, and as the
22 Court has seen, this is not -- unfortunately an unusual
23 kind of circumstance where an individual starts
24 collecting adult pornography on the computer. Mr. Swarm
25 did, indeed, collect child pornography as part of his

1 misguided, really, way of thinking that this was better
2 in some measure than being around children. And at the
3 time -- and he feels much differently now, but at the
4 time he thought, um -- he gave various kinds of
5 explanations of why it was that that was a better thing,
6 a lesser of two evils, to collect child pornography.

7 And he recognizes now that that's quite wrong and
8 you're going to hear not from him, but from a therapist,
9 in a later age, that he does recognize the difficulty
10 and the really, um, disordered thinking that he had at
11 that time.

12 THE COURT: I'm sorry. I'm going to hear from
13 who on that?

14 MR. WATKINS: I expect Sarah Walsh will talk
15 about that insight. That's the Family and Children's
16 Society treatment provider. Um, Mr. Swarm received
17 treatment there during the period of time that he was on
18 supervised release. I think she'll begin to talk about
19 that. I think you'll hear that from the experts in
20 their interviews of him, more insight about what he did
21 in understanding how terrible even a collection
22 seemingly -- well, that a collection of child
23 pornography can be. And you'll certainly hear from
24 Mr. Swarm himself.

25 He was sentenced in 2000 to 78 months'

1 imprisonment in the Bureau of Prisons. That Judge
2 Skullen, of the Northern District of New York,
3 recommended that he go into what was then the Butner Sex
4 Offender Treatment Program, but for reasons that are
5 still unclear there's no mention in the records from the
6 Bureau of Prisons why he was not put into any kind of
7 program while he was there. Whether that was a space
8 thing or something else, we simply don't know. The
9 records do not reflect why that did not happen.

10 Instead, he went to Fort Dix in New Jersey and
11 served his entire sentence there, was offered the usual
12 kinds of counseling that one gets in the Bureau of
13 Prisons. He took advantage of that to some point, but
14 found it was not particularly useful in the milieu in
15 which he was, except for on one occasion where indeed he
16 was suicidal as a result of -- or seemed to be suicidal
17 for a few days as a result of a particularly traumatic
18 incident at home when his dog was taken to be euthanized
19 at a dog shelter. But beyond that, what you're going to
20 hear is that Mr. Swarm did conform his behavior to the
21 Bureau of Prisons' policy.

22 I don't believe there are any disciplinary reports
23 at all against him. I think, um, he was caught smoking
24 in an unauthorized area. I think that is the sum total
25 of his disciplinary history over the course of six and a

1 half years. So it was certainly the case that he was
2 quite able to conform his conduct while in the Bureau of
3 Prisons.

4 Once released, um, he was released on what --
5 well, the initial judgment had the conditions of
6 release. As is happening really every year now as the
7 probation department gets more up to date with the tools
8 that they have, immediately upon release his probation
9 officer moved to modify the conditions of release to add
10 fairly specific kinds of conditions. They went to
11 Mr. Swarm, the probation department did, and asked him
12 to consent to those modifications, um, which he did, and
13 what you're going to hear is that that began a period of
14 time when he was quite compliant with the directions of
15 his probation officer. And you're going to hear, I
16 believe, that they did have quite a focus on him, but
17 perhaps not for the first two or three months. Um,
18 there was a time where -- there was a question where he
19 was going to be supervised, whether it's going to be out
20 of the Syracuse office or out of the Binghamton office,
21 but once that's resolved, um, the probation officer --

22 THE COURT: I'm sorry. Why don't you finish.

23 MR. WATKINS: Oh, I'm sorry. -- the probation
24 officer directed him to a treatment program, who
25 evaluated him -- actually had evaluated him before the

1 end of his sentence, and they took him in and he began
2 treatment.

3 Admittedly everybody involved, the probation
4 office, the treatment program, was skeptical, um,
5 cautiously optimistic, but skeptical about Mr. Swarm's
6 ability to engage in treatment. Again, this was an
7 individual who in the past had sought out treatment and
8 had not always completed it, and didn't think
9 necessarily that he needed it. But against, um, all
10 odds, he flourished, to a certain extent, in the
11 treatment groups, which was no small matter for
12 Mr. Swarm, an individual raised in the Catholic
13 tradition and also raised in a family milieu which --
14 well, that what is private is private.

15 What he was forced to do there was to go into
16 group therapy, talk about some of the acts he did and
17 some of the feelings he did, and the reports you're
18 going to see, as time goes along, um, was that he became
19 engaged in that and, indeed, was able to open up.
20 Again, it's not the heavens opening up and some kind of
21 epiphany, but there was marked improvement as Mr. Swarm
22 went along.

23 At the same time the probation department was
24 monitoring him, um, at the monthly supervision reports,
25 all of which Mr. Swarm turned in. He was -- he had to

1 live in his father's home, with whom he was estranged,
2 before his conviction. The reason he had to move in
3 there was because of the New York sex offender residency
4 requirements would not allow him to live in his mother's
5 home where he lived all along. Really what you saw was
6 Mr. Swarm quite isolated in Marathon, New York, quite
7 rural, with very little to do. His physical
8 circumstances don't allow him to work. So he was
9 monitored by the probation department and compliant with
10 all of the usual conditions of probation. And that
11 continued on for many months.

12 THE COURT: Actually let me interrupt you for
13 a moment. As you were speaking, it occurred to me that
14 it may be desirable to send Dr. Mills and Dr. Saleh's
15 reports to Mr. Price -- I think it is?

16 MR. WATKINS: Pierce.

17 THE COURT: Sorry. -- before he testifies,
18 because I'm going to be interested in knowing whether
19 probation, um, has the -- in New York, has the ability
20 to provide the kind of treatment that either or both of
21 them are saying is necessary. And it now would include,
22 if it was medically justified, the pharmacological
23 treatment.

24 Do you have a problem with --

25 MR. WATKINS: I would -- my sense, reviewing

1 this case and speaking with Mr. Pierce for a short
2 period of time, he is very -- I don't know if he's a
3 specialist in this, but he's very, um -- what is the
4 word? -- experienced in, um, the kinds of conditions
5 and the like. I'm quite sure he'll have ready answers.
6 But I think, um, sending the reports to him can't hurt.

7 THE COURT: Does the Government agree?

8 MS. CONNOLLY: Fine, your Honor. I know he's
9 on his way up today, so we wouldn't be able to get him
10 the reports until tonight.

11 THE COURT: Okay. But do you expect to see
12 him?

13 MS. CONNOLLY: Tonight.

14 THE COURT: All right. I'll give you an
15 order. Please give him the two reports that Mills -- or
16 the two reports that Saleh wrote, and tell him I'm going
17 to ask whether his office would have the capacity to
18 arrange the kind of treatment that either or both say
19 would be desirable, including the pharmacological
20 treatment if it was medically justified, because that's
21 something he should be prepared to testify about
22 tomorrow. I suspect that my friend, Judge Skullen,
23 would be responsive if his probation department
24 recommended something for Mr. Swarm.

25 Go ahead.

1 MR. WATKINS: The difficulty was that,
2 particularly in the summer of 2006, there were bumps in
3 the road, there was contact with, um, children that
4 clearly violated his probation conditions. Having said
5 that --

6 THE COURT: When you say "contact," are you
7 talking about being in the vicinity of children or
8 physical contact?

9 MR. WATKINS: No, he would be in the vicinity
10 of children. There was not physical contact as we might
11 imagine when we talk about contact offenses with
12 children. There was an incident where the child of a
13 friend came up and hugged him while that friend was
14 close by. There was also a time when I believe while
15 Mr. Swarm was waiting for somebody in a chair, a child
16 jumped up in his lap.

17 So was there physical contact? Indeed there was
18 physical contact. Was it what we all are concerned
19 about as far as risk? That's a question the Court can
20 answer, I think, after it hears. Because one could --
21 while it was certainly something that Mr. Swarm should
22 have guarded against all along, one could see it as
23 incidental contact that certainly is regrettable that it
24 happened, and more importantly that Mr. Swarm should
25 have immediately reported to his probation officer,

1 which he did not, and that was the basis for the
2 violation. But the violation was for Grade C offenses,
3 it was not for any kind of criminal conduct, it was for
4 failing to report this incidental conduct or failing to
5 report things that happened while he was out there.

6 He was in possession of adult pornography and,
7 again, that is something, Mr. Swarm will tell you, came
8 to him by happenstance. Again, he should have reported
9 it, he should have turned away, he didn't. It was a
10 bump in the road. He did not tell his probation officer
11 until it came time to do that. And by "time," I mean he
12 was encouraged to share in his group sessions when
13 things would go wrong, when he backslid, and indeed he
14 reported that, albeit on -- I'm sorry?

15 THE COURT: Go ahead.

16 MR. WATKINS: And what you're going to hear
17 from Mr. Pierce and the probation department is their
18 view that he did that only because there was an
19 impending polygraph exam which he knew he would fail if
20 he didn't disclose about that. But nevertheless he
21 chose to and did relate those incidents and talked about
22 those to his probation officer.

23 Again, red flags and worthy of sanction? That's
24 exactly what happened here is that the probation
25 department moved to sanction him before Judge Skullen of

1 Grade C offenses, a guideline sentencing range of 3 to 9
2 months, Judge Skullen chose 4 months, and then the
3 conditions of release, which were more severe for the
4 next time around, are quite in line with the kind of
5 sanctions that this court or any court would do to make
6 somebody understand, who is capable of understanding,
7 that you may think it's a small thing to be, you know,
8 or have incidental conduct -- um, contact with a child
9 and not report it, but, you know, in your circumstances
10 you have to be better than that, you have to be 100
11 percent compliant. And that was what the sanction was.

12 What you're going to hear, I think, from
13 Mr. Pierce and from Ms. Walsh, when she testifies, is
14 they were fully ready to take him out on those
15 conditions once he was released from those four months,
16 that four-month sentence, and begin anew with him,
17 again, with a higher level of supervision that --
18 perhaps the electronic monitoring or perhaps even some
19 kind of GPS device, or perhaps inpatient treatment, but
20 they were ready to work with him again. This was not a
21 person for whom at least people were putting up stop
22 signs and saying "This is not somebody who is going to
23 be able to function in society."

24 And that's what brought him into the, um, Bureau
25 of Prisons' custody. For better or for worse that four

1 months occurred at the same time that the Bureau of
2 Prisons began implementing the Adam Walsh Act, and here
3 we are.

4 I think actually factually there's not going to be
5 a lot of dispute, as it seems is the case with these
6 cases, with the sexually dangerous person cases, it
7 really is what can one infer, or more precisely, what
8 can one predict on the basis of these signs that we
9 have, and is it enough to convince someone that there's
10 an unacceptable risk going forward.

11 The experts come at it from two different angles.
12 Dr. Saleh and Dr. Mills come at it from very different
13 kinds of angles and they come out with different
14 conclusions at the end. I'm going to hazard a guess
15 that by the end of the trial, the Court's going to hear
16 that their positions are not terribly different, um,
17 when it comes down to it. I think they will both say
18 that pedophilia is a very, very difficult kind of
19 diagnosis both to make, and once made, to predict what
20 is the best course of action for somebody. But they
21 will also say that, um, treatment, um, and just putting
22 somebody away for the rest of their life, is probably
23 not the most efficient way or the necessary way to deal
24 with it, that there are other ways to go at that.

25 I think that is what, as the Court has already

1 indicated, that's where the action is going to be, is
2 whether this court can see, as Mr. Swarm goes out for
3 the next 5 years, until he's 50 years old, um, will the
4 conditions -- will what the probation department has in
5 store for him for the next five years be enough to
6 ameliorate the risk? I think the Court's going to find
7 that it is more than enough and that, for that reason,
8 that Mr. Swarm should not be committed.

9 THE COURT: And just to tease this out a
10 little further, he's got 4 years and 8 months of
11 supervised release and then, in my mind, the question
12 will be -- will he make enough progress in treatment
13 that it won't be a substantial -- you know, there won't
14 be the required risk that he'll have substantial
15 difficulty in refraining when he's off the supervised
16 release? Is that a reasonable iteration of the issue?

17 MR. WATKINS: It is, your Honor. I should
18 just -- just to be clear, for some reason, and I don't
19 know why, but it's 4 years 6 months, even though that
20 the imposition was 4 months, that he could have done 4
21 years and 8 months.

22 THE COURT: I see.

23 MR. WATKINS: It's 4 years and 6 months.

24 I think, as a practical matter, and again you'll
25 hear this both from Dr. Mills and Dr. Saleh, um, that

1 age is going to start to play a factor, as the Court
2 heard during the **Wilkinson** trial, that is an issue here
3 in all of these cases. Mr. Swarm is of an age where the
4 -- all of the -- even the actuarial tools will tell us,
5 that the incidences of offense starts to drop off.

6 As a practical matter, given the level of scrutiny
7 that Mr. Swarm is under in the community, not just from
8 the probation department, but from the Sex Offender
9 Registry Act and the residency requirements and the
10 kinds of practical reality in small-town New York life,
11 um, he is going to -- if he's going to reoffend, it will
12 happen quite quickly. But I think what you're going to
13 hear is that that's not an issue, that Mr. Swarm can
14 conform his conduct to meet not just the probation
15 requirement, but any concern that there is an ongoing
16 risk here.

17 THE COURT: Okay. Thank you.

18 MS. PIEMONTE-STACEY: Your Honor, one
19 housekeeping matter.

20 All of these exhibits, 1 through 36, were
21 admitted. The Government would just request, and I
22 think with respondent's assent, that Exhibit 27, the
23 presentence investigation, be under seal.

24 THE COURT: Okay. I will place it under seal
25 temporarily, but this is an open proceeding and the

1 decisions, um -- well, let me ask you this. Why do you
2 want it under seal, does it mention, for example, the
3 names of third parties or victims?

4 MS. PIEMONTE-STACEY: It mentions the names of
5 the victims and also just the statutory language that
6 says it's not to be disclosed.

7 THE COURT: But it can be disclosed upon a
8 court order.

9 MS. PIEMONTE-STACEY: That's right.

10 THE COURT: All right. I will place it under
11 seal because of solicitude for the victims who were
12 named, um, but to the extent there's questioning about
13 it, the questioning will be in public session. And, um,
14 if there's information in there that's relevant to my
15 decision, that information will be public, although it
16 probably won't be necessary to refer to any victim by
17 name. Okay. So Exhibit 27 is under seal.

18 Are we ready to get Dr. Mills?

19 MR. WATKINS: I think that we are, your Honor.

20 THE COURT: All right. Dr. Barry Mills,
21 please.

22 (Witness enters courtroom.)

23 THE COURT: Dr. Mills, I've been told that
24 you're taking some medication that may make you
25 nauseous. If you feel that coming on and are able to

1 give us an alert, I'll take a recess and try to get you
2 someplace.

3 THE WITNESS: Thank you.

4 THE COURT: All right.

5 (DR. BARRY J. MILLS, sworn.)

6 THE COURT: Okay. Have you agreed that
7 Mr. Watkins would go first or have you discussed it?

8 MS. PIEMONTE-STACEY: Yes, your Honor.

9 THE COURT: Okay. Go ahead.

10

11 *****

12 DR. BARRY MILLS

13 *****

14

15 DIRECT EXAMINATION BY MR. WATKINS:

16 Q. Would you please state your name for the record.

17 A. Barry Joseph Mills.

18 Q. Dr. Mills, do you see a document before you there?

19 A. Yes.

20 Q. And do you recognize that?

21 A. Yes, I believe it's my resume. Yes.

22 Q. And was that provided -- was that provided to the
23 court clerk today?

24 A. Yes.

25 MR. WATKINS: With the Court's permission, I

1 would enter that as exhibit --

2 THE COURT: It's Exhibit 36.

3 MR. WATKINS: 36.

4 THE COURT: Okay, it was previously admitted
5 with the others. 1 through 36 are in evidence.

6 MR. WATKINS: So I take it, your Honor,
7 there's no need to formally move for admission of any of
8 the exhibits that are agreed upon?

9 THE COURT: Correct.

10 Q. Dr. Mills, where are you currently employed?

11 A. I'm in private practice in Santa Barbara, California
12 and working part time for the University of California
13 at Santa Barbara.

14 Q. And you're part time. That's a private practice?

15 A. Both are part time, yes.

16 Q. And what kind of -- what is that practice engaged
17 in?

18 A. General psychiatry.

19 Q. And any particular specialty in psychiatry?

20 A. No.

21 Q. Your teaching responsibilities, what do you do at
22 Santa Barbara?

23 A. Minimal. Um, primarily I'm working at the UC Santa
24 Barbara in student health. I do do some minimal
25 teaching and research involvement with the Department of

1 Psychology.

2 Q. When did you move to California to begin your own
3 practice?

4 A. One year ago.

5 Q. And where were you before that?

6 A. I was at Cambridge Health Alliance here in Boston
7 and Mass General Hospital.

8 Q. Why did you move to Santa Barbara?

9 A. Um, a variety of reasons, one of which was some
10 health problems.

11 Q. Do you have an undergraduate degree?

12 A. Yes.

13 Q. Where is that from?

14 A. Austin College in Sherman, Texas.

15 Q. And what was your field of study? What did you
16 major in?

17 A. Philosophy.

18 Q. After getting your undergraduate degree, where did
19 you go?

20 A. Then I went to the University of Texas, Southwestern
21 Medical School, in Dallas, for an M.D. degree, and then
22 for psychiatry training at the University of Texas
23 Health Science Center at San Antonio.

24 Q. And do you also -- so do you now have a medical
25 degree?

1 A. Yes.

2 Q. And do you also hold other advanced degrees?

3 A. Yes. I have a PhD in cultural studies, comparative
4 religions, and a master's degree in the same field.

5 Q. And where did you receive those?

6 A. From Pacifica Graduate Institute in Santa Barbara.

7 Q. Since becoming a psychiatrist, did you ever work for
8 a jail or any prison systems?

9 A. Yes.

10 Q. And when did that begin?

11 A. Um, primarily from the very beginning, that was my
12 first job out of college, and I consistently did
13 forensic psychiatry pretty much until a year ago.

14 Q. When you say "forensic psychiatry," how does that
15 differ from clinical psychiatry?

16 A. Technically it's any interface between medicine and
17 the law, so it can be civil issues, criminal issues, the
18 management and treatment of offenders. For me it was a
19 collection of all of it.

20 Q. Were you employed by -- at North Texas State
21 Hospital?

22 A. Yes.

23 Q. And can you describe that institution?

24 A. It's a maximum security state hospital at Texas.
25 It's essentially the equivalent of Bridgewater in

1 Texas. It's where any person who's either in the prison
2 system or the state hospital system that were deemed
3 either too dangerous or had some pending criminal issue
4 were sent there. It was kind of a hybrid between a
5 prison and a hospital and I was the chief psychiatrist
6 for one of the programs there.

7 Q. And how long were you chief psychiatrist?

8 A. Oh, many years. Five, probably. Something like
9 that.

10 Q. And this was a secure facility?

11 A. Oh, yes.

12 Q. As part of your job, were you responsible for doing
13 evaluations?

14 A. Yes.

15 Q. Would you do evaluations for possible civil
16 commitment?

17 A. Yes.

18 Q. How many of those evaluations have you done while in
19 Texas?

20 A. Hundreds, if not, you know, approaching a thousand.
21 It was pretty much our daily issue there.

22 Q. Did you also evaluate for insanity cases, the
23 capacity to understand right and wrong?

24 A. Yes.

25 Q. How many of those cases did you do?

1 A. Um, in my private practice, you know, less than a
2 hundred, and at the state hospital position, probably
3 about the same number.

4 Q. And so you were required to testify in court in
5 Texas?

6 A. Frequently.

7 Q. Um, did you testify for the state of Texas on their
8 behalf?

9 A. Yes, definitely.

10 Q. And did you testify for defendants on their behalf?

11 A. Yes.

12 Q. Do you have some kind of percentage breakdown of how
13 often you would do each?

14 A. In the beginning it was probably 60/40, state, and
15 probably in the latter years it became more towards the
16 defense.

17 Q. And the individuals you were working with and doing
18 commitments for, um, were these people that committed
19 violent crimes or were they less serious kinds of cases?

20 A. Usually quite violent.

21 Q. And would that include sex offenses?

22 A. Yes.

23 Q. At the time that you worked in Texas, was there a --
24 well, does Texas have a civil commitment statute?

25 A. For sex offenders or regular civil crime?

1 Q. For sex offenders.

2 A. They do. It's very different, but, yes, they do.

3 Q. Does it end up with inpatient commitment?

4 A. No, Texas has kind of gone in the direction of
5 outpatient sex offender commitments.

6 Q. Did you conduct any of those or did you do
7 evaluations for purposes of that, um, sex offenders?

8 A. That was getting started up pretty much at the time
9 I was leaving.

10 Q. Now, did you do an evaluation of Andy Swarm?

11 A. Yes.

12 Q. And have you brought a copy of that evaluation with
13 you today?

14 A. I believe I have.

15 Q. Do you have one with you or do you need me to give
16 you a copy?

17 A. I can get it. (Gets copy.)

18 MS. PIEMONTE-STACEY: Excuse me, your Honor,
19 if I may? I have an exhibit -- the Government has an
20 exhibit book that we've prepared. If I have permission,
21 I'll place it on the witness stand.

22 THE COURT: Sure, that would be helpful.

23 MS. PIEMONTE-STACEY: Thank you, your Honor.

24 MR. WATKINS: And, your Honor, if I may also
25 get the monitors, I think you have to hit "Defense 4."

1 THE COURT: Here.

2 (Pause.)

3 Q. I've put up on the screen what's been marked as
4 Exhibit 31. Do you see that?

5 A. Yes.

6 Q. And is that indeed the report of the evaluation?

7 A. It definitely looks like it, yes.

8 THE COURT: Is that the April 28th, 2008?

9 THE WITNESS: I believe so.

10 Q. Now, I'm turning to the last page of that report,
11 which has been marked -- it looks like Exhibit 31A. Is
12 that the update that you sent to the Court on December
13 14th, 2010?

14 A. Yes.

15 Q. When were you first contacted to do an evaluation?

16 A. I'd have to go back to my records, but the spring of
17 2008, I think.

18 Q. And what did you do when you undertook the
19 evaluation?

20 A. Um, reviewed records, met Mr. Swarm, and conducted
21 an evaluation.

22 Q. And when you say you reviewed the records, what
23 records do you recall that you reviewed?

24 A. There was a whole host of them provided. I think I
25 listed some of them, just in general. But prison

1 records and previous probation records, things like
2 that.

3 Q. And these were all records that were provided by the
4 Court to you?

5 A. I believe so, yes.

6 Q. In 2008, how many times did you meet with Mr. Swarm?

7 A. I believe just once.

8 Q. And did you perform some tests?

9 A. Yes.

10 Q. What kinds of tests did you perform?

11 A. Well, the standard mental status examination has
12 some testing on it, things like memory, attention span,
13 but the main formal test that I gave him was the
14 executive interview. It's a specific test for frontal
15 lobe executive dysfunction.

16 Q. And how long did you meet with him at Devens?

17 A. I don't remember. It's on my original bill. A
18 couple of hours is a normal assessment time.

19 Q. And typically meeting with a -- someone you're
20 evaluating for commitment, what kinds of conversations
21 do you have with the person?

22 A. Well, in general, um, you try to stay openended. I
23 mean, first, you explain the purpose of the evaluation
24 because it's not for treatment. They have to understand
25 that. But then you go with a fairly openended

1 evaluation and see what they say in response to a lot of
2 questions and then you transition it more into a
3 structured interview, maybe asking them to explain what
4 they say in the context of something you read. And then
5 finally you move to much more formal testing, where it's
6 very specific questions and answers about things, like
7 assessing their memory and things like that.

8 Q. What was your observations of Mr. Swarm as far as
9 his responding to you, his ability to speak with you
10 about these issues?

11 A. He did fairly well.

12 Q. When you say "fairly well," was he -- what's the
13 word, "guarded" or was he "open"?

14 A. Well, he was -- when I say "fairly well," he was
15 attentive, he was on track, he was able to understand
16 the questions. There was -- there was a guardedness,
17 somewhat of an evasiveness about details. I mean, it's
18 a very stressful situation for someone because of the
19 implications. But some minimization, kind of spinning
20 things towards a positive direction, while
21 simultaneously taking responsibility for a number of
22 things. So it was kind of a mixed bag.

23 Q. Um, this guardedness and evasiveness and
24 minimization, is that unusual in your experience for
25 persons for whom you're considering civil commitment?

1 A. No.

2 Q. And did you -- did Mr. Swarm understand why it was
3 you were there as far as you could tell?

4 A. Yes.

5 Q. He understood that he was being considered for a
6 commitment?

7 A. For a sex offender commitment, yes.

8 Q. Now, when doing an evaluation, part of the
9 evaluation is actually observing the person while you're
10 asking the questions?

11 A. Yes.

12 Q. Also observing the person before and after, if
13 possible?

14 A. Yes.

15 Q. Did you have a chance to observe Mr. Swarm other
16 than while you were asking him questions?

17 A. Yes.

18 Q. And was this in the waiting room there at -- well,
19 the visiting room at Devens?

20 A. Yes.

21 Q. And did you see him even before you started speaking
22 with him?

23 A. Yes, the prison had assigned us to a room where I
24 was located and then the inmate was in a -- kind of a
25 giant waiting area with a whole lot of other people. He

1 was sitting there for a while.

2 Q. Um, these interviews rooms, they're off of that
3 giant visiting room, right?

4 A. Yes.

5 Q. Is one of those rooms dedicated to children?

6 A. Yeah, it looks like a playroom where people that are
7 visiting who have kids can allow their kids to, I guess,
8 play a lot of toys, and little chairs, and things like
9 that.

10 Q. Now, did you make any significant observations of
11 Mr. Swarm while he was sitting there waiting to come in
12 to meet with you?

13 A. I believe, as I recall, there were children just
14 kind of running around the area where he was, which took
15 me a little bit aback. The room that we were using for
16 the interview was right next to the room for the
17 children to play in. Um, I was a little taken aback
18 with that.

19 Q. As far as Mr. Swarm's reaction to that environment,
20 did you notice anything of significance?

21 A. No, he seemed very appropriate and, you know, not
22 doing anything that brings alarms.

23 Q. For example, he was not fixated on children or
24 unexpected attention to that children's room?

25 MS. PIEMONTE-STACEY: Objection.

1 THE COURT: To the leading quality.

2 Sustained.

3 Q. And how long was Mr. Swarm out in that big room
4 before you could see him?

5 A. Approximately 10 minutes.

6 Q. Did you see any indication of impatience or
7 fidgetiness -- being fidgety?

8 A. No.

9 Q. After reviewing the records and interviewing
10 Mr. Swarm, did you come to a conclusion about whether he
11 met the requirements of 18 U.S.C. 4248?

12 A. Um, yes, I did come to a conclusion.

13 Q. And what is that conclusion?

14 A. I didn't think he met all the criteria.

15 Q. In addition to the evaluation and the, um, interview
16 of him, did you also do a risk assessment?

17 A. I don't know if I did an independent risk assessment
18 or I just reviewed the one that had already been done
19 and I agreed with it. But I didn't have any
20 disagreement with the ones that had already been done.

21 Q. I'll show you here, and I'll try to focus on it a
22 little better.

23 (Pause.)

24 Q. You talk about the limitations of the actuarial
25 tools?

1 A. Yes.

2 THE COURT: What page is that, please?

3 MR. WATKINS: It's got to be Page 26.

4 Q. And you indicate some -- well, what are you saying
5 here about the actuarial risk assessments that you read
6 about?

7 A. Well, the two most commonly used now, the RRASOR and
8 the Static 99, um, there's a lot of criticism about
9 them. They certainly have helped in some ways, but
10 they've also, um, in many of our opinion, are a little
11 bit overstated in their value. For example, on this
12 particular assessment, um, the defendant has a long
13 history of misbehavior that counts against him on some
14 of these instruments that's also been quite ameliorated
15 in recent years. Age, being one of the significant
16 factors in these statistical analyses that isn't taken
17 into official consideration, and once people get older,
18 their risk tends to go down. The other test was -- I
19 think he was knocked down for some points because he
20 hadn't been able to hold a job, which I thought was a
21 little bit paradoxical because he's been declared
22 disabled for Social Security for so many years that
23 technically he wasn't really supposed to have a job.

24 Q. What did he score on the two tests that you used?

25 A. I would have to look specifically for the ones.

1 (Pause.) On the Static 99, he scored a 6, which is high
2 risk of reoffending. And then on the RRASOR, he scored
3 a 2, which was actually a low risk of sexual reoffense.

4 Q. But either way, um, what is your conception of how
5 much to be guided by those actuarials?

6 A. I think they're helpful. They're certainly more
7 helpful than just a pure clinical approach. But it's
8 almost a worse mistake to then flip and rely completely
9 upon that. So it's a guided-type of assessment. The
10 fact that it's got a discrepancy between the numbers
11 here shows one of the problems with a purely actuarial
12 approach. I mean, he does have some risk. He is not
13 without risk for the future. But I don't think that the
14 risk that they are describing, in many ways, is directly
15 applicable to the question that I was being asked.

16 Q. So when you began thinking about whether Mr. Swarm
17 qualified under the statute, how did you go about it?
18 What did you consult in your thinking?

19 A. Well, in forensic psychiatry we try to be really
20 careful as to what the actual law -- or the question,
21 the legal question that we're being asked, says, so
22 they're -- the statute has some unique wording that has
23 kind of complicated the assessment when people like
24 myself do them. For example, you know, as opposed to,
25 um, you know, just saying the person "is at a certain

1 level of risk," it says "the person has difficulty
2 refraining from certain behavior." The two things are
3 different. A statistical risk is different than saying
4 an individual is going to not be able to refrain from a
5 behavior. So you might be able to infer certain things
6 from it, but they're not equivalent. So essentially I
7 went through each step and tried to answer each question
8 separately.

9 Q. And in preparation for that did you actually try to
10 come up with a diagnosis of Mr. Swarm?

11 A. Yes.

12 Q. And how does one come up with a diagnosis as a
13 psychiatrist?

14 A. Well, there's many different ways. But the most
15 common way is -- (Coughs.) The most common way is, um,
16 through a collection of the person's symptoms and
17 history, both symptoms that they report and symptoms
18 that are more objectively reported about them. You
19 compare it to, um, statistical clusters of syndromes,
20 illnesses, diagnoses that have been established in the
21 literature, of varying degrees of scientific validity.
22 But there's a book called the Diagnostic and Statistic
23 Manual that has some definite advantages and
24 disadvantages. It's -- in the United States, it's the
25 most commonly used diagnostic manual, that do certain

1 diagnoses meet certain criteria? And in my opinion, he
2 met some of the criteria for some of these diagnoses.

3 Q. Now, when you do the diagnoses using the DSM,
4 there's talk about axes, different axes?

5 A. Yes.

6 Q. Can you describe what those different axes are?

7 A. Well, it is an unusual document and it's in flux. I
8 mean, currently the APA is meaning to come out with a
9 whole new version of this that changes a number of these
10 things. But in general the DSM-IV has five axes,
11 probably the most important are Axis 1 and 2. Axis 1 is
12 reserved for certain types of illnesses and Axis 2 for
13 other types of illnesses that are qualitatively
14 distinct. Axis 1 is normally what we consider major
15 mental illnesses or disorders. Axis 2 is for things
16 like mental retardation or personality disorders. Axis
17 3 is for physical health conditions like diabetes. Axis
18 4 is a measure of -- no matter what else is going on
19 with other axes, Axis 4 is a measure of what stress
20 disorders they have going on in their life. And then
21 Axis 5 is called a GAF, a Global Assessment of
22 Functioning, it's a number from 0 to 100, that tries to
23 kind of take the whole picture into consideration and
24 say, "Let's give a rough round number to how this person
25 is doing in light of these other four axis."

1 Q. Um, let's do the easy one first, Axis 5, which is
2 Global Assessment of Functioning.

3 A. Yeah.

4 Q. How did you score Mr. Swarm?

5 A. A 65.

6 Q. And what is the scale on which that's based?

7 A. Um, it's very detailed and at times it's almost
8 contradictory because it's trying to balance symptoms
9 and functioning, which can separate out independently at
10 times. But essentially a GAF score of 65 is someone who
11 is having some mild impairment in their life, um, but
12 not to the point that they need to be in a hospital or
13 anything of that sort.

14 Q. When we talk about the need to be in the hospital as
15 far as the Axis 5, Global Assessment of Functioning,
16 that would be somebody that simply can't take care of
17 the activities of daily living?

18 A. Well, it could be a variety of things, but what we
19 teach is that a GAF score of 50 or below, the person
20 needs to be in the hospital unless there's something
21 else that, in rare circumstances, they can be monitored
22 24-7 at their home. But in general, um, a score of 50
23 or below, we would tell a student, "Okay, this means
24 you're going to put the person in the hospital,
25 correct?" Anything above a 50, you know, can be

1 anywhere from is right on the edge of needing to be in
2 the hospital to having no symptoms at all.

3 Q. And this would take into account a variety of
4 factors, medical, social, as well as the mental health
5 issues, correct?

6 A. Yes.

7 Q. Um, going back to Axes 1 and 2, which you said are
8 the two more important. You diagnosed -- well, did you
9 come to a diagnosis of Mr. Swarm on Axis 1 and 2?

10 A. Yes.

11 Q. And what were those diagnoses?

12 A. Well, Axis 1, pedophilia, um, it has some
13 qualifiers, but the main diagnosis is "pedophilia,
14 sexually attractive to females, non-exclusive." He also
15 has three diagnoses of substance abuse, polysubstance
16 dependence, cannabis dependence, and alcohol dependence,
17 all three of which are in remission probably due to
18 incarceration. And then Axis 2, the personality
19 disorder NOS, which is an acronym for "not otherwise
20 specified," with antisocial narcissistic and borderline
21 features.

22 Q. Now, I'm going to go to Axis 2 first, um, not
23 otherwise specified. Can you talk a little bit about
24 antisocial personality disorder, is that what you've
25 diagnosed Mr. Swarm with?

1 A. No, definitely not, he does not meet the criteria
2 for antisocial personality disorder, but he does have
3 some antisocial traits. One of the dilemmas that we get
4 into in diagnosing on the DSM is -- one of the
5 weaknesses of it is it's a categorical diagnosis. If
6 you have three out of the five symptoms, you meet the
7 criteria for the diagnosis, where if you have just, for
8 example, 2 out of 5, you don't meet it at all. It's a
9 black and white, all or nothing, which is really
10 limiting because some person might have some significant
11 antisocial traits, but they don't meet the full criteria
12 for it. A personality disorder not otherwise specified
13 is a way of saying that a person, they definitely have a
14 personality disorder, but it doesn't fit any of the
15 classic, specific personality disorders because they've
16 got kind of a smattering of different ones.

17 Q. And is there a concern as far as the future of
18 somebody who is diagnosed with antisocial -- well, let
19 me back up.

20 Is there a difference in concern between somebody
21 who's diagnosed with antisocial personality disorder as
22 opposed to personality disorder not otherwise specified?

23 A. Well, any of the not otherwise specified diagnoses
24 are -- I'm always a little bit, um, hesitant because
25 there's less research on it. It's a "wastebag

1 diagnosis," which is to say that there's a lot of
2 research on the antisocial personality disorder or the
3 borderline personality disorder, but there's less
4 research on personality disorder NOS. It's more of a
5 clinical tool for people to say, "There's something
6 going on here, but we haven't really been able to either
7 get enough information to be given the more specific
8 diagnoses or we have enough information and they really
9 don't meet the diagnoses that most of the research is
10 done on."

11 In terms of the prognosis, all the personality
12 disorders do not have a good prognosis, but there is
13 some general amelioration of symptoms that seems to
14 occur once people reach their 40s. They call it the
15 "burnout." That if a person with a personality disorder
16 can make it to about 45, it doesn't mean they're cured,
17 but their life seems to develop a new stability and they
18 get into less trouble. We don't know why this is and
19 it's hotly debated because there's some evidence that,
20 in fact, this doesn't happen, and maybe they just get
21 better at being antisocial and don't get into as much
22 trouble. But for the most part the evidence is that
23 something happens with aging and that it becomes less of
24 a problem.

25 Q. When evaluating Mr. Swarm and looking at his records

1 and his present functioning, do you see consistency with
2 him in aging out?

3 A. I see some lessening of symptoms, yes.

4 THE COURT: I'm sorry. His symptoms of
5 personality disorder?

6 THE WITNESS: Yes, sir.

7 THE COURT: And what specifically do you see
8 diminishing?

9 THE WITNESS: Well, people with personality
10 disorders, particularly this collection, they call them
11 the "Cluster D" collection, antisocial, narcissistic and
12 borderline, they tend to live very loud, dramatic,
13 chaotic lives. So there's always something going on in
14 their life that is an issue of concern where they're
15 suicidal one day, they're very depressed the next day,
16 and then they're not depressed. Then the next day they
17 get into a fight with somebody. It's just -- one of the
18 things that we use to describe somebody with personality
19 disorders is a "stable chaos." From the outside it kind
20 of looks like their life is just in continuous chaos.
21 And, in fact, if you just look at it over time, they're
22 always kind of in chaos.

23 That's what seems to change once someone with a
24 personality disorder makes it to their 40s or 50s is
25 they actually start to develop some real, more healthy

1 stability in their lives. So, I mean, if I looked in
2 the records or heard that Mr. Swarm was just constantly
3 in fights in prison and was on suicide precautions
4 frequently and then off them the next day, that would
5 indicate a very active personality disorder that's still
6 not ameliorated at all. But that really hasn't
7 happened. The structure of prison is -- for him, he's
8 actually doing fairly well.

9 Q. And while on that you did review the Bureau of
10 Prisons' report and including any potential disciplinary
11 reports?

12 A. Yes.

13 Q. And there were none, none of any significance?

14 A. Correct.

15 Q. Now, you did diagnose Mr. Swarm with pedophilia?

16 A. Yes.

17 Q. And what was that -- well, let me ask you this. Part
18 of your evaluation you spoke with Mr. Swarm?

19 A. Yes.

20 Q. And what did he tell you about whether he has
21 pedophilia or not?

22 A. You know, I'm not sure I asked him specifically if
23 he thought he had the diagnosis, because he was fairly
24 forthcoming that he is sexually attracted to young girls
25 and has been for a long time.

1 Q. And as you looked through the reports and you looked
2 through the, um -- did your own interview, is it true
3 that Mr. Swarm actually admitted offenses that were
4 known about other than his admissions?

5 A. I believe so.

6 Q. And is that unusual, in your experience, for
7 somebody who's diagnosed with pedophilia?

8 A. Um, yes and no. You know, if the evidence is
9 against them, they may go ahead and admit it. On the
10 other hand, there was a forthcomingness on his part that
11 wasn't just a complete denial that I had met with other
12 pedophiles.

13 Q. And the -- besides the conversations with Mr. Swarm,
14 what other basis was there for your diagnosis of
15 pedophilia?

16 A. Um, the records have indicated also statements that
17 he has made at other times, at other assessments.

18 Q. And pedophilia is recognized by the DSM-IV and the
19 literature as a -- as an abnormality or a mental
20 illness? What's it recognized as?

21 A. Well, there's huge debates on the semantics of
22 "disorder" or "syndrome" or "abnormalities." Um, in
23 general I -- to me pedophilia is a mental disorder, um,
24 and it's accepted in the medical community.

25 Q. And I think you've, um -- in your report you talked

1 about it being a mental disorder, as recognized in the
2 literature, but not a serious disorder. Is that the
3 gravamen of your report?

4 A. Yes, and I'm not sure I worded this exactly the way
5 I would like because, of course, "serious" could mean a
6 lot of different things. If we're saying "serious" in
7 terms of implications to society, then obviously it's
8 quite a serious disorder. The way I interpreted it was
9 more of, in terms of in the medical literature when we
10 say something is a "serious" disease or illness or
11 disorder or something is not, um, there's a lot of
12 literature and evidence that would question whether or
13 not pedophilia is a serious disorder in that sense.

14 Q. And is that a -- when you talk about the literature,
15 can pedophilia ever be a serious disorder?

16 A. Well, I suspect there are people that would
17 definitely say that. I would disagree. I did a -- I've
18 had literature searches for "serious mental disorder,"
19 looking at what is the debate on this, and I was
20 impressed that, in a variety of articles that I found,
21 no one of them diagnosed or used pedophilia in that
22 criteria.

23 MS. PIEMONTE-STACEY: Your Honor, I move to
24 strike. It's outside of the report, the literature
25 cited in the report, nor is that conclusion cited within

1 the report.

2 THE COURT: Well, I think I'll reserve
3 judgment on that. Thank you. I mean, I will wait to
4 see what happens when you cross-examine because --

5 (Pause.)

6 THE COURT: It could possibly come in under
7 Rule 803.18 if this is something that he's relying on in
8 his direct examination and in providing his opinion. I
9 guess I'd have to look closely at the report and see if
10 there's some more equitable reason for excluding it. At
11 a minimum this would go to the weight. Let's see how it
12 gets developed.

13 Q. What you talked about was the literature in the
14 community, the medical community about whether
15 pedophilia is serious or not. How does that compare to
16 the "serious," as far as you understand it, the word
17 "serious" in the statute in 4248?

18 A. I don't know. I don't know what they intended.

19 THE COURT: Well, here, I can help you on
20 this, because this is my job and I wrote to it on
21 **Wilkinson.**

22 It's my conception, and it might change in the
23 course of this case, but this is a matter of legislative
24 intent and I think, in your report, you pointed out that
25 "abnormality" is not a -- a "mental abnormality" is not

1 a word used in the medical community, but it has been
2 used in statutes, including the first one I think the
3 Supreme Court found constitutional is a civil commitment
4 in ***Kansas vs. Hendricks***.

5 My present understanding is that a "mental
6 abnormality" is essentially analogous or synonymous with
7 a "mental illness or disorder" as clinicians would use
8 those terms, and that the DSM-IV-TR generally says that
9 the "mental illnesses" it recognizes can have varying
10 degrees of severity.

11 So subject to what I am educated to understand in
12 this case, I understand that a "serious abnormality"
13 means a serious mental illness and a mental illness
14 could be serious for one of two reasons. One, it's a
15 type of illness that is always severe in terms of
16 causing distress to the individual who has it or, for
17 the purposes of this case, always severe in causing an
18 inability to control conduct, or the second would be it
19 might or might not be severe in its impact on a person's
20 ability to control his conduct and -- well, generally,
21 and then what do the facts show in this case? Does the
22 person have the mental illness to the degree that it is
23 properly said there's a serious volitional problem, a
24 serious inability to control engaging in illegal
25 conduct?

1 So hopefully -- well, let me ask you this. Does
2 what I said generally make sense to you as a expert --
3 as a psychiatrist?

4 THE WITNESS: Um, yes, it's complicated, but
5 the part -- one of the parts that jumped out at me was
6 the presence of the diagnosis automatically -- one of
7 the conditions is if the presence of the diagnosis
8 automatically infers a serious difficulty in
9 refraining?

10 THE COURT: Yeah, let me clarify that. I'm
11 saying conceivably it could. Maybe, in your opinion,
12 there's no such diagnosis that would always cause a
13 serious inability to control impulses. And, in fact, I
14 think in this case the parties agree, and it's my state
15 of mind, that pedophilia is not, in every person, um, a
16 serious mental illness or abnormality within the meaning
17 of the statute. And it seems to be undisputed that
18 Mr. Swarm is properly diagnosed with pedophilia and the
19 issue for me is going to be to decide whether it is so
20 severe in it's impact on his ability to control his
21 behavior that I should find that it's serious within the
22 meaning of the statute, that it would cause him serious
23 difficulty in refraining from engaging in sexual
24 violence or child molestation.

25 THE WITNESS: I would agree with that, yes.

1 THE COURT: Okay.

2 Q. So breaking that down, is that your view, that there
3 are different levels of severity of pedophilia once
4 diagnosed?

5 A. Yes.

6 Q. And would there, um -- again, are you able to put a
7 particular individual on a continuum of how severe their
8 pedophilia is?

9 A. Well, um, he has a nonexclusive pedophilia, so he --
10 you know, there are pedophiles that are just
11 continuously obsessed with one particular sexual issue
12 always involving children. So he would not have that.
13 On the other hand, is this a recurrent primary fantasy
14 for him throughout his life? Yes.

15 Q. And you did diagnose nonexclusive as opposed to
16 exclusive. As far as the severity, generally speaking,
17 exclusivity is a more severe form of pedophilia?

18 A. I think that would be one element of it, yes, but
19 much more depending on his individual behavior. I mean,
20 if he was -- for example, I've had patients that are --
21 despite being locked up for years, are almost
22 continuously masturbating to the fantasies that they
23 have, that's pretty severe and serious. Um, so there's
24 a spectrum here and he's somewhat in between.

25 THE COURT: When you reach a convenient

1 breaking point, we'll take about a 15-minute morning
2 break.

3 MR. WATKINS: This is fine, your Honor.

4 THE COURT: All right. We will take a break
5 and resume at 11:15. The Court is in recess.

6 (Recess, 11:00 a.m.)

7 (Resumed, 11:20 a.m.)

8 THE COURT: You may resume.

9 MR. WATKINS: Thank you, your Honor.

10 Q. Before we broke we were talking about the standard
11 for "serious" as used in the statute and, um, the Court
12 indicated that that might correlate with "severity."
13 Having heard that explanation, does that change your
14 opinion at all about whether Mr. Swarm suffers from a
15 serious mental illness?

16 A. Well, if I'm understanding correctly, there's
17 nothing about pedophilia, in and of itself, that says
18 it's a severe illness, condition, but that it certainly
19 can be depending on the individual aspects of the case.

20 Q. And are you prepared to give an opinion, based on
21 the severity of Mr. Swarm's pedophilia, whether it rises
22 to "serious"?

23 MS. PIEMONTE-STACEY: Objection.

24 THE COURT: All right. Overruled. I'm
25 sorry. What's the objection?

1 MS. PIEMONTE-STACEY: Your Honor, I thought he
2 was asking him to go outside the scope of his report
3 again.

4 THE COURT: Well, I think this goes right to
5 the heart of the issue, overruled, and to what his
6 report covered in part. Overruled.

7 (Pause.)

8 A. (Reads.) I don't know, I really don't know if they
9 do or not. I mean, it's possible. Um, just the way I
10 have thought about this case is that almost -- I think
11 it's possible that it could be a serious pedophilia. It
12 is possible, yes.

13 Q. And --

14 THE COURT: Well, let's -- do you have an
15 opinion to a reasonable degree of medical certainty as
16 to whether Mr. Swarm's pedophilia is serious?

17 THE WITNESS: In the context of the different
18 ways of looking at the word "serious," um, I would say,
19 "Yes, it is serious."

20 Q. Um, moving on. You also talked, in your report, at
21 some length, um -- and I'll paraphrase, that they're
22 trying to figure out what Congress was getting after
23 when they talked about "suffers from"?

24 A. Yes.

25 Q. Do you recall that?

1 A. Yes.

2 Q. Now, you testified in the **Wilkinson** matter and also
3 before Judge Tauro in **Graham**?

4 A. Yes.

5 Q. As a result of testifying and learning the statute,
6 has your thinking about "suffers from" changed at all?

7 A. Well, yes and no. I think if it's a more liberal
8 definition of "suffering from," meaning "has the
9 condition," then absolutely.

10 THE COURT: Okay, here. And, again, this is
11 my role to define the terms, although I'm interested in
12 what the medical community would say, if they're
13 familiar terms, but I, thus far, would interpret
14 "suffers from" to be meaning "has," not that he has
15 anguished from it, but that he has it.

16 A. So then, in that sense, yes, he has it.

17 Q. All right. So with that I want to turn to the third
18 question you answered, which was whether he would have
19 serious difficulty refraining from further acts of child
20 molestation? And you answered that question, "No,"
21 correct?

22 A. Yes.

23 Q. Turn to Page 23 of your report. (Pause.) Yes, 23
24 of your report.

25 You talk here about some of the reasons or your

1 interpretation of the statute and how to go about
2 determining whether somebody has serious difficulty in
3 refraining. Do you recall that?

4 A. Yes. (Reads.)

5 THE COURT: It would be most helpful for me if
6 you just asked him if that's his opinion today and if so
7 what the bases are rather than him reading his report
8 that was written a couple of years ago.

9 Q. Have you reviewed the report in preparation for
10 today's testimony?

11 A. Yes.

12 Q. And is that still your opinion that he does not meet
13 that aspect of 4248?

14 A. That's correct.

15 Q. And what is the basis for your conclusion?

16 A. Well, it's essentially a -- to me a question of
17 volitional control and there's nothing inherently about
18 pedophilia or a personality disorder and particularly
19 about his particular presentation that shows an
20 inability to -- or a serious inability to control his
21 behavior. In fact, I think he's probably in quite good
22 control.

23 Q. And what gives you the basis for saying he's in
24 quite good control of his behavior?

25 A. Well, a variety of things. I mean, his general

1 behavior outside of just specific sexual behavior is
2 under good control. Specifically the best way in the
3 medical world that we have for assessing volitional
4 control is through assessment of the executive cognitive
5 functions and his are quite intact.

6 Q. In your report you went into the issue of desire and
7 control of desires. Is that what you mean by
8 "volition"?

9 A. Um, no, I think they're slightly different. Um,
10 "desire" can mean an object of sexual attraction. It
11 could be pedophilia. It could be normal sexual
12 interaction. So the mere qualitative difference of
13 "desire" does not infer anything about a quantitative
14 inability to control one's behavior. So I think that's
15 important because it's a frequent lay understanding that
16 anyone that was a pedophile must just not be able to
17 control their behavior to do such a thing, and that's
18 not the case.

19 Q. In Mr. Swam's case you wrote, in the report, that,
20 um, "his desire was not overwhelming." What was the
21 basis for your conclusion?

22 A. Well, for one thing he certainly is not a
23 hypersexual individual, he's not someone that the prison
24 is reporting him masturbating on a frequent basis. Sex
25 does not seem to occupy most of his life.

1 Q. May I interrupt you there? When you were in North
2 Texas did you see individuals where that was true, that
3 sex occupied their life?

4 A. Oh, absolutely.

5 Q. And how would that be manifested in a prison
6 setting?

7 A. Um, it can get quite bizarre, people that actually
8 had to be put in straight-jackets, they would masturbate
9 so much that they would start to harm their genitals.

10 Q. And there's no indication of any of that kind of
11 thing in the records here for Mr. Swarm?

12 A. No.

13 Q. Admittedly he -- he admitted to masturbating,
14 correct?

15 A. I believe so, yes.

16 Q. You talk a little bit about the lack of disciplinary
17 reports. As far as the volition, what is the connection
18 of a lack of disciplinary reports to a finding of
19 volition?

20 A. Well, it's not an automatic inference, but it does
21 tend to show that within a certain set of guidelines and
22 rules, he understands them and is able to follow through
23 with them and chooses to do that. He's not having
24 difficulty with getting into trouble for certain types
25 of things that he doesn't want to be doing. I mean,

1 people with volitional control frequently get into
2 trouble for something that a minute, an hour a day later
3 they're incredibly angry with themselves because they
4 really didn't want to be doing that and they knew it but
5 they just could not control themselves at the time. If
6 anything, Mr. Swarm has demonstrated, even when he was
7 in the free world, careful, meticulous, um, cautious
8 action in acting out his pedophilia.

9 Q. Turning back to the exit interview. That raises --
10 and let's say in layman's terms, whether there's
11 cognitive impairment?

12 A. Well, yes and no. The executive functions are
13 currently bridged between cognitive impairment and
14 behavior. The frontal lobes of the brain are the parts
15 of the brain that say "No." So, for example, it's --
16 this is one of the paradoxes of when children get
17 stimulants and it calms them down. It doesn't make any
18 sense why a stimulant would calm someone down and make
19 them actually more in control of their behavior. But it
20 does if you understand that stimulants primarily work on
21 the frontal lobes of the brain, they stimulate the
22 frontal lobes so that the very part of that brain that's
23 inhibitory, that tells the rest of the brain, "No," is
24 working, and there's -- and working well. And there's
25 nothing in Mr. Swarm that says that his frontal

1 inhibitory system is defective.

2 Q. And are the results from that exit interview
3 consistent with volitional control then?

4 A. Yes. Compared to a normal population, he's within
5 the normal range.

6 Q. Um, now, clearly, your opinion about difficulty
7 refraining is not completely unqualified. I think
8 you've already said there is a risk, right?

9 A. But the two aren't exactly the same. I mean, people
10 commit offenses not necessarily out of a lack of
11 volitional control, I mean, he can choose to be bad.
12 That's one of the problems with the RRASOR or the Static
13 99 is that it's also including people that choose to
14 reoffend as opposed to those who have some type of
15 inability to control their behavior.

16 Q. Um, I'm going to turn to -- you mentioned substance
17 abuse diagnoses that you --

18 THE COURT: I don't know if this is a good
19 point to -- and perhaps the government intends to do it,
20 but you haven't asked him about the criteria for a
21 diagnosis of pedophilia, and in view of the testimony he
22 just gave about the possible difference between desire
23 and acting on the desire, um, I'm curious about what the
24 criteria are.

25 MR. WATKINS: Okay.

1 Q. Are you familiar with the criteria for diagnosing
2 pedophilia?

3 A. Yes, but I couldn't recite them from memory, though.

4 Q. You can or cannot?

5 A. Cannot.

6 Q. I believe, um -- (Looks.) I'm handing you a book.
7 Can you identify what that book is?

8 A. Um, the Diagnostic and Statistical Manual IV, Text
9 Revisionist. This is the current active one.

10 Q. And is that the DSM that's currently relied upon in
11 the field?

12 A. Yes.

13 Q. Um, the DSM-V is due to come out, is that correct?

14 A. It's in process right now, yes.

15 THE COURT: What page are you looking at?

16 THE WITNESS: 572.

17 Q. And on Page 572, what do you see there?

18 A. It is the diagnostic criteria for pedophilia.

19 Q. And perhaps you could go through the diagnostic
20 criteria and tell the Court how Mr. Swarm does or does
21 not meet those criteria.

22 A. Sure. There's three main criteria. "Over a period
23 of at least six months, recurrent, intense sexually" --

24 THE COURT: Excuse me. Not too fast for the
25 Court Reporter.

1 A. I'll repeat it.

2 Criteria A: "Over a period of at least six
3 months, recurrent, intense sexually-arousing fantasies,
4 sexual urges or behaviors, involving sexual activity
5 with a prepubescent child or children, generally aged 13
6 years or younger."

7 And Part B: "The person has acted on these sexual
8 urges or the sexual urges or fantasies caused marked
9 distress or interpersonal difficulty."

10 And Criteria C: "The person is at least 16 years
11 old and at least five years older than the child or
12 children in Criteria A."

13 Q. Now, with respect to Criteria C, um, looking at the
14 records, all of those factors are met, is that safe to
15 say?

16 A. Yes.

17 Q. Um, Criteria A talks over a six-month period of
18 time. That can be anywhere in a person's lifetime or
19 does it need to be within that last six months?

20 A. Anytime.

21 Q. And Mr. Swarm has admitted to you, and in records,
22 that he's had those fantasies during periods of his
23 life?

24 A. Yes.

25 Q. And then as to Criteria B, how does Mr. Swarm fit

1 that?

2 A. He has acted on these urges.

3 Q. And, again, under the criteria, that could be
4 anytime in the lifetime presumably after the age of 16?

5 A. Yes.

6 MR. WATKINS: Did your Honor have any further
7 questions or should I --

8 THE COURT: Not -- not at this point. Thank
9 you.

10 Q. The six-month period talked about "recurrent" and
11 "intense." Is it your understanding or experience that
12 that could change over time?

13 A. Yes.

14 Q. So that while that might happen in one six-month
15 period of time, at a later portion of life that could be
16 less or completely eliminated?

17 A. It's less common, but it does happen, yes.

18 THE COURT: I'm sorry. What's less common?

19 THE WITNESS: That people actually become less
20 pedophilic at some later point in age.

21 Q. And you diagnosed Mr. Swarm with a nonexclusive-type
22 of pedophilia. Is that defined in the DSM, nonexclusive
23 versus exclusive?

24 A. Yes, that's one of the qualifiers. If it's
25 exclusive, they're only sexually attracted to children.

1 Nonexclusive is they're sexually attracted to children
2 and to adults as well.

3 Q. So as far as recurring images and fantasies for a
4 nonexclusive pedophile, that could change to fantasies
5 of more grown women?

6 A. Yes, in fact, that would be part of the treatment.
7 It's one of the factors. It's a complex issue, but if
8 you're going to help someone move from pedophilia to
9 nonpedophilia, or at least not acting on that, if they
10 -- if they're the nonexclusive type, you've got a little
11 bit more to work with as opposed to trying to create
12 sexual attraction to something they never actually
13 have.

14 Q. I want to move back to the serious difficulty in
15 refraining and also your diagnosis of substance abuse.

16 First, when you spoke with Mr. Swarm, um, he's not
17 drinking or drugging now while he's in jail, correct?

18 A. That's correct.

19 Q. And so when you saw that or made that diagnosis,
20 that was from the past records which indicated that
21 there had been a substance abuse problem?

22 A. Yes.

23 Q. And, of course, he was convicted of growing
24 marijuana in his home in 2000, correct?

25 A. Yes.

1 Q. Um, I think what you wrote is -- let's see if I can
2 get it up here. (On screen.) "Substance abuse is a
3 significant contaminating variable in the respondent's
4 risk assessment."

5 Certainly substance abuse can -- a diagnosis of
6 substance abuse can remit over a person's lifetime?
7 Somebody can become clean?

8 A. Yes.

9 Q. And someone that's clean, for a period of time, then
10 would not have this contaminating variable?

11 A. Well, it kind of depends on the reasons they're not
12 clean. Being locked up is certainly important, but, um,
13 it is slightly different.

14 Q. For example, um, hypothetically, if a person was
15 released on supervised release and was on supervised
16 release for a period of 10 months after having been in
17 prison for, in part, growing marijuana, would that
18 indicate to you a remission of substance abuse?

19 A. That would certainly move in that direction, yes.

20 Q. And as far as volitional control -- well, first,
21 Mr. Swarm's abuse of marijuana and/or alcohol, was
22 that -- was that severe according to records?

23 A. Yes.

24 Q. Um, and that is something that can be a subject of
25 volitional control, to stop drinking and drugging?

1 A. Particularly alcohol, yes.

2 Q. Is that true also of marijuana?

3 A. Not as much.

4 Q. So to the extent one has volitional control and has
5 a serious substance abuse problem -- well, let's see.
6 One has a substance abuse problem and isn't able to stop
7 completely drinking and drugging for a period of time,
8 does that indicate the existence of volitional control?

9 A. Um, I mean wanting to recover from substance abuse
10 is a very complex issue. I mean, strangely, Step 1 of
11 the 12-step program is to admit that you don't have
12 control over things, but paradoxically the whole idea is
13 that you actually start to get some control over your
14 life but in a different kind of way. So, you know,
15 someone stopping using may or may not be a volitional
16 decision, but it certainly -- the continued use, despite
17 serious consequences, will indicate a total lack of
18 volitional control, possibly, or just choosing to do
19 something they know they're going to get into a lot of
20 trouble for.

21 Q. Um, I want to turn now to the issue, again, in the
22 context of serious difficulty in refraining, of age.
23 Um, you talked about, as far as the borderline
24 personality disorder, that individuals as they age tend
25 to exhibit the symptoms of that less so or can?

1 A. Yes.

2 Q. Um, is there a similar decline, as far as acting
3 out, on pedophilia?

4 A. Um, there is evidence for that, yes.

5 Q. Is it as much as it is in borderline personality?

6 A. I don't know if I've ever seen a direct one-to-one
7 comparison. Age is probably the single most important
8 factor and, um, if you had to reduce it to one issue in
9 terms of risk for pedophilia. But I've never seen a
10 comparison between personality disorders and sexual
11 offenses.

12 Q. Now, you learned that Mr. Swarm has diabetes?

13 A. Yes.

14 Q. He characterizes that as "brittle diabetes"?

15 A. Yes.

16 Q. Is that a medical term, "brittle diabetes"?

17 A. Yes.

18 Q. And what does that connote?

19 A. It's a particularly unfortunate or bad form of
20 diabetes where your blood sugar is more rapidly and
21 unpredictably out of control. Some people have diabetes
22 but their blood sugar is just high and it kind of stays
23 high. Other people can have diabetes where the blood
24 sugar just goes up and down on a quite frequent basis.

25 Q. Um, you've seen indications on the record where

1 Mr. Swarm has done things and indicated that that was a
2 result of his diabetes?

3 A. Yes.

4 Q. Where you've seen that, is that consistent with your
5 understanding of how brittle diabetes might impact
6 someone?

7 A. It could be.

8 THE COURT: Done what kinds of things?

9 Q. For example, holding up a chair and threatening
10 somebody?

11 A. Well, it's complex, it's any kind of behaviors that,
12 um, involve volitional control, actually. I mean,
13 someone with a very high or very low blood sugar, one of
14 the very first things that will go is their
15 understanding of their environment and their ability to
16 interact with it. I think it's complicated though by --
17 it also appears at times Mr. Swarm has used his diabetes
18 as an excuse to -- for certain behaviors in the past.
19 That whether he's done that or not, it certainly doesn't
20 detract from the fact that brittle diabetes can have a
21 significant impact on one's brain.

22 THE COURT: Just so I understand this. In
23 your opinion, can brittle diabetes injure volitional
24 control?

25 THE WITNESS: Yes. Absolutely.

1 Q. And how long does that volitional -- does that
2 impairment of volitional control -- well, let's take two
3 steps.

4 Someone who is hyperglycemic, has high blood
5 sugar, how long would that inability to volitionally
6 control last?

7 MS. PIEMONTE-STACEY: Objection.

8 THE COURT: Well, I don't know if he said
9 there was an inability, but --

10 MS. PIEMONTE-STACEY: Well, can he ask for
11 Mr. Swarm, your Honor, as opposed to -- well, there's a
12 likely difference with people.

13 THE COURT: Well -- but that objection is
14 overruled. Um, to the extent you're able to answer, you
15 may.

16 A. You know, it does very much depend on the individual
17 case. There's two levels to it. There is the immediate
18 effect because high-enough blood sugar and a person can
19 become delirious, disoriented and go into a coma, and
20 vice-versa, almost the same thing with a low blood
21 sugar. So that can be almost an immediate effect within
22 a 24, 48 hour period and can reverse itself almost as
23 quickly with appropriate treatment. The second level is
24 the long-term effects. Brittle diabetes is not healthy
25 for the brain. It causes very tiny little strokes in

1 the brain over long periods of time and even if you get
2 your blood sugar under really good control, you can
3 still have these kind of long-term issues associated
4 with it.

5 Q. Um, I'll be direct. When we're talking about
6 volitional control, um, someone with brittle diabetes,
7 to the extent they have high blood sugar or low blood
8 sugar, is that the kind of volitional control where
9 they're going to go out and molest a child?

10 MS. PIEMONTE-STACEY: Objection.

11 THE COURT: Overruled. I might not let him
12 answer that if a jury was here. But go ahead.

13 A. Well, I think it depends. Um, to me the biggest
14 issue is substance abuse. Substance intoxication would
15 be the most immediate thing that could affect his risk
16 of reoffending. But if his diabetes were to really get
17 out of control, that would be a significant issue, too.
18 The worst-case scenario for him is to leave, not have
19 appropriate medical supervision, as his blood sugar gets
20 really up or down, and to start drinking again.

21 Q. And you saw that he's on disability and he has
22 medical insurance, correct?

23 A. Correct.

24 Q. And he's talked with you about his management of his
25 diabetes, that he takes insulin?

1 A. Yes, he's very good about that.

2 Q. Um, when you reviewed the Bureau of Prisons' records
3 for Mr. Swarm, did you see indications where he had
4 declined psychological treatment while in the Bureau of
5 Prisons?

6 A. I would have to go back and review. I don't -- that
7 doesn't jump out at me. The first thing that jumps out
8 at me is that there wasn't a lot offered.

9 Q. But to the extent anything was offered, you don't
10 recall particularly whether he took advantage of it or
11 not?

12 A. No.

13 Q. And there was no indication in the records that sex
14 offender treatment was offered to him?

15 A. That's correct, which is -- well, I can elaborate on
16 that, but that's correct.

17 Q. At the conclusion of your report you talked about
18 prognosis and management for Mr. Swarm. You've written
19 that: "You believe his prognosis is poor if he's either
20 committed to long-term psychiatric inpatient care or
21 released to the community with no follow-up or
22 treatment."

23 THE COURT: What page is that, please?

24 MR. WATKINS: I'm sorry. That's the last page
25 of your original report, which would be Page 30.

1 (Pause.)

2 Q. When you talk about his prognosis, is his prognosis
3 including the risk of reoffending?

4 A. Yes.

5 Q. Um, and it seems like you said either of those two
6 extremes would not help?

7 A. Yeah, I don't believe long-term hospitalization
8 would be helpful. In fact, he might get worse with
9 that. And, of course, no treatment at all would be the
10 most worst-case scenario. But a very intensive or
11 outpatient-monitored program, with sex offender
12 treatment, with substance-abuse monitoring, it really
13 gives him the best prognosis and that includes in terms
14 of minimizing the reoffending.

15 Q. And what do you base that conclusion on, that that
16 would be the best course?

17 A. Well, this is the standard of care for most sex
18 offender treatment is done as an outpatient. It doesn't
19 mean there's not a risk of relapse or reoffending. But
20 inpatient treatment doesn't offer a lot of advantages
21 other than just control of the environment. Um, the
22 other thing is that with his personality disorder, the
23 long-term hospitalization of personality disorders
24 paradoxically seems to make them worse. That very thing
25 that they tend to get better once they get into their

1 40s or 50s, um, doesn't seem to happen as much if
2 they're doing this in an institutionalized-type setting
3 where they can get quite regressed and dependent upon
4 that and then it's difficult to actually get them out of
5 the institution.

6 Q. And you talked about --

7 THE COURT: Could I just ask you one
8 question.

9 You say the prognosis is much better if he's
10 released to a "community-based mandatory program." What
11 do you mean by "community-based mandatory program"?

12 THE WITNESS: Well, there are -- they're not
13 common, but there are a number of sex offender treatment
14 programs that are kind of the gold standard where people
15 are mandated to go to these, to attend on a very
16 frequent basis, um, and that there are consequences if,
17 in fact, they don't attend. So it's highly structured.
18 The "community-based" means it's very integrated in the
19 community. You have a case manager that actually goes
20 out and checks in on him on a regular basis. They don't
21 -- they're not naive, they, um, you know, understand
22 that they need to be looking for objective signs, if
23 things are not going right. You know, these aren't
24 common programs. But when these people do the best,
25 it's frequently in these types of programs.

1 Q. And, um, you mentioned 12-step programs. Like
2 12-step programs, are there times when people make
3 progress and times when they fall back?

4 A. Yes.

5 Q. You talk about your experience in Texas and your
6 knowledge that Texas does not do inpatient civil
7 commitment?

8 A. Yes, for sex offenders.

9 Q. For sex offenders. When you talk about these
10 programs, is that based on your experience or your
11 knowledge of Texas or is it wider than that?

12 A. It's wider than that. I mean, this is one of the
13 arguments that's going on in Texas at the time when they
14 were trying to decide how to do this. Because, for
15 example, it's incredibly expensive to set up these
16 inpatient programs and if the outcome is actually no
17 better with the structured inpatient versus outpatient,
18 that was one of the arguments that was used to say,
19 "Well, let's just set up an intensive outpatient
20 program."

21 Q. And are you aware of studies at all in Texas about
22 the efficacy of outpatient, particularly, for
23 pedophilia?

24 MS. PIEMONTE-STACEY: Objection. Outside the
25 scope again, your Honor.

1 THE COURT: Well, again, I might or might not
2 let a jury hear this, but I'm going to overrule it. And
3 I'll see, if I consider it at all, what weight to give
4 it, once you examine on it.

5 A. I'm not familiar if there is this in Texas for sex
6 offender programs. I am familiar with it for more
7 general offenders that included some sex offenders and
8 some nonsex offenders. I ran one of those programs.

9 Q. Um, in your conclusion and prognosis here, you talk
10 not just about, um, treatment, but also intensive
11 supervision. Would that be a part of reducing the risk
12 in your mind?

13 A. Absolutely.

14 Q. I'm going to show you now a document you haven't
15 seen. Well, perhaps you've seen it. It was in the
16 materials. (Looks.) This is Exhibit 25.

17 A. (Turns.)

18 Q. I'm going to try to -- (Adjusts screen.) This
19 document is entitled "Special Conditions of
20 Supervision." Mr. Swarm will be released -- if he were
21 to be released, he would be on these particular
22 conditions of supervision.

23 I want to go through them and ask you, as to each
24 one, if this is what you had in mind as far as intensive
25 cooperation?

1 THE COURT: Let me just clarify. Is this the
2 judgment on the revocation of supervised release?

3 MR. WATKINS: Correct. Exhibit 25.

4 THE COURT: Okay.

5 Q. Number 2 is what you talked about, "Participating in
6 a mental health program"?

7 A. Yes.

8 Q. "Which may include outpatient and/or inpatient
9 treatment." At least on the surface is that consistent
10 with the kinds of programs you're talking about?

11 A. Definitely.

12 Q. Um, Number 4 says: "You shall refrain from the use
13 of alcohol while in treatment and for the remainder of
14 the term of supervision following the completion of
15 treatment." That's consistent with what you've told us
16 is necessary for Mr. Swarm?

17 A. That and probably, I'm sure, it may be in here
18 somewhere else, but that he has to comply with any
19 request for testing to verify that.

20 Q. And I'll jump down to Number 10.

21 A. Oh, yes, I see it.

22 Q. "He may reach out, participate in a program for
23 substance abuse, which shall include the testing for
24 drug and/or alcohol use and may include inpatient or
25 outpatient treatment"?

1 A. Yes.

2 Q. So that would be consistent with a program you think
3 would -- has the best chance of working for Mr. Swarm?

4 A. Yes.

5 Q. Number 5 is: "You shall not have direct contact
6 with a person under age 18, unless it's supervised by a
7 person approved by the probation office"?

8 A. Yes.

9 Q. And then it goes on to talk about indirect contact
10 also being prohibited?

11 A. Yeah, and just specifically for him, he should have
12 no access to a computer.

13 Q. Number 6 talks about prohibited being in an area
14 where a person under the age of 18 are likely to
15 congregate such as school grounds, childcare centers, or
16 playgrounds. Is that a reasonable condition?

17 A. Yes.

18 Q. And Number 8, again, restates I think what we saw in
19 Number 2: "A mental health program which will include,
20 but not be limited to, participation in a treatment
21 program for sexual offenders"?

22 A. Yes.

23 Q. And then it goes on to talk about using -- including
24 examinations using polygraphs?

25 A. That I wasn't familiar with. I've never -- I'm

1 hesitant about those. But I've seen those be used, yes.

2 Q. And Number 9 talks about the computers, except that
3 perhaps employment seemingly is not an issue with
4 Mr. Swarm, who is completely disabled?

5 A. Yes.

6 Q. Um, it does not prohibit the use of a computer, but
7 allows unannounced examination of a computer, correct?

8 A. That does, but to me, in the beginning, I don't
9 think he should have access at all to computers.

10 Q. And then jumping down to Number 11. "You shall
11 serve home detention for your term of supervised release
12 to include electronic monitoring or other location
13 verification system." Are you familiar with persons
14 released on electronic monitoring?

15 A. No, I have not had direct clinical experience with
16 that, but that did not seem unreasonable.

17 Q. And are you familiar with programs they use for
18 global positioning satellites to determine the
19 whereabouts of an offender at any particular time?

20 A. Yes.

21 Q. Even though you're not personally aware about it, is
22 that a sensible condition?

23 A. Yes.

24 Q. And would that go to any length to reduce the risk
25 that Mr. Swarm presents?

1 A. Yes.

2 Q. So having read through those conditions, in light of
3 your conclusion, would release to a mental health
4 treatment program, and in the community with these
5 conditions, better serve the long-term prognosis?

6 A. I believe so.

7 MR. WATKINS: That's all I have, your Honor.

8 THE COURT: Well, let me just put your last
9 question a little differently.

10 Mr. Swarm will be on supervised release for four
11 and a half years if he's released as a result of my
12 decision in this case. If he's released on these
13 conditions and, among other things, is required to
14 participate in a sex offender treatment program with the
15 threat that he'll be locked up again if he doesn't
16 participate and successfully complete it, in your
17 opinion will he, during the period of let's say
18 treatment, um, have serious difficulty in refraining
19 from sexually violent conduct or child molestation?

20 THE WITNESS: I would say "No" with an
21 asterisk that as long as he is refraining from substance
22 abuse and is closely monitored by a doctor for his
23 diabetes.

24 (Pause.)

25 THE COURT: All right. Then about how long do

1 the -- in your experience, do the community-based
2 mandatory sex-offender treatment programs that you've
3 referred to take?

4 THE WITNESS: Years.

5 THE COURT: Years. So he might be in such a
6 program for the four and a half years of his supervised
7 release?

8 THE WITNESS: Yes.

9 (Pause.)

10 THE WITNESS: In fact, can I add one thing,
11 your Honor?

12 THE COURT: Yes.

13 THE WITNESS: That reminds me. For his
14 particular case, as a special condition, I mean this
15 probably goes without saying, but having a close follow-
16 up with a medical doctor for his diabetes, I think,
17 almost should be a condition and it should not be enough
18 just for him to rely on saying that his diabetes is
19 under control. He needs to be seeing someone on a
20 regular basis that is checking that and verifying that.

21 THE COURT: All right. And then assume
22 hypothetically he ends the four and a half years of
23 supervised release. Actually, let me take a step back.

24 When you say that the treatment can take years, in
25 your opinion, do some people come to the point where

1 they no longer need to be in that program because
2 they're --

3 THE WITNESS: Yes. It's interesting, though,
4 that a lot of times if people really get into these
5 programs and do it the right way, they continue in it
6 voluntarily even after it's no longer mandated. It's
7 almost thinking like AA, that this is a lifetime issue
8 that will lessen in its severity. If he can complete
9 four and a half years of this type of program and not
10 get into trouble, he would be doing quite well. He
11 probably would have the tools set to go on and be
12 successful the rest of his life.

13 THE COURT: That's what I was getting at,
14 because you've expressed the opinion that, you know, if
15 he were released on these conditions and was compliant
16 with them, he wouldn't be dangerous during -- he
17 wouldn't have serious difficulty in refraining from
18 engaging in sexual violence or child molestation while
19 he was on supervised release.

20 So now let's say he's finished that four and a
21 half years. Do you have an opinion as to whether, when
22 he was no longer on supervised release, um, he would
23 have serious difficulty from refraining, um, from
24 engaging in child molestation or other sexual violence?

25 THE WITNESS: Well, of course, our ability to

1 predict kind of decreases over -- the longer he goes
2 out. But if he's able to complete this program
3 successfully, then his risk, after that point, would
4 almost, by definition, be less. And that his highest
5 risk time is going to be probably within the first year
6 of his release.

7 THE COURT: Why is that?

8 THE WITNESS: He's not used to living in the
9 world. He's been locked up. There's going to be
10 challenges that present to him that he hasn't really had
11 to deal with, and that's what one of these intensive
12 programs would help him with and walk him through it.
13 By the end of four and a half years, the goal would be
14 that it's so internalized in him, by that point, that he
15 wouldn't really need somebody else monitoring him so
16 closely.

17 THE COURT: All right. Thank you very much.

18 You know what wasn't covered, and maybe it was
19 intentional or inadvertent, but do you want to ask about
20 his opinion of pharmacological treatment?

21 MR. WATKINS: Um, I was going to rely on the
22 report.

23 MS. PIEMONTE-STACEY: I'll ask, your Honor.

24 THE COURT: All right. Okay. Very good.

25 MS. PIEMONTE-STACEY: If I could just have a

1 minute, your Honor?

2 THE COURT: Certainly.

3

4 CROSS-EXAMINATION BY MS. PIEMONTE-STACEY:

5 Q. Good afternoon.

6 A. Good afternoon.

7 Q. You were asked about the number of times that you
8 examined Mr. Swarm in 2008. Do you recall that?

9 A. Yes.

10 Q. Okay. And I'd just like to refer you to Exhibit 31,
11 the very first page of your report.

12 A. (Turns.) Oh, I stand corrected. I did see him
13 twice.

14 Q. You saw him on April 7th, 2008 as well as April
15 26th, 2008?

16 A. That's correct.

17 Q. And was that approximately two hours each time you
18 saw him?

19 A. I would have to look at my bill, but approximately
20 that's usually what I spend with them, yes.

21 Q. Okay. And then you saw him again on November 12th,
22 2010, is that right?

23 A. Yes.

24 Q. And as part of your examination, you asked Mr. Swarm
25 to voluntarily participate in the interview, is that

1 correct?

2 A. Yes.

3 Q. And, um, you went through a number of factors that
4 you might call "informed consent," is that right?

5 A. Yes.

6 Q. And if I refer you to Page 2 of your report, you
7 told him the purpose of the interview, right?

8 A. Yes.

9 Q. The lack of any doctor-patient relationship?

10 A. Yes.

11 Q. You told him of the potential consequences to him
12 from the evaluation?

13 A. Yes.

14 Q. You informed him that nothing he said would be
15 confidential, correct?

16 A. Yes.

17 Q. You told him you would be sending a report about
18 this case report?

19 A. Yes.

20 Q. And that you'd likely be called to testify as well,
21 correct?

22 A. Yes.

23 Q. You told him he had a right not to answer specific
24 questions or not to participate at all, correct?

25 A. Correct.

1 Q. And that any decision he made not to answer
2 questions or not participate wouldn't be viewed
3 negatively, is that right?

4 A. Correct.

5 Q. And you reminded him of these factors of informed
6 consent halfway through the interview, right?

7 A. Correct.

8 Q. And that's to be sure he retained them?

9 A. Correct.

10 Q. Now, um, during your interview with Mr. Swarm you
11 asked Mr. Swarm the purpose of the examination, correct?

12 A. Correct.

13 Q. And you testified earlier that he said, um, he knew
14 it was for certification under the Adam Walsh Act,
15 correct?

16 A. That's what I remember, yes.

17 Q. But he also told you, um, and I'll refer you to Page
18 3 of your report, on the top of Page 3, quote, "The
19 government is just trying to keep another group locked
20 up." Do you recall that statement?

21 A. Oh, yes.

22 Q. And you also asked him to elaborate on that
23 statement, right?

24 A. Yes.

25 Q. And he told you that the federal government was

1 trying to, quote, "expand its power," unquote?

2 A. Correct.

3 Q. And that was by, quote, "indefinitely incarcerating
4 sex offenders after their sentences," is that right?

5 A. Yes.

6 Q. Mr. Swarm never mentioned, um, that the federal
7 government committed people for treatment, did he?

8 A. Um, that's not what he said at that time, no.

9 Q. Now, you also asked Mr. Swarm to give you his
10 personal history, right?

11 A. Correct.

12 Q. And as part of the personal history, one of the
13 things Mr. Swarm told you was that his father had
14 sexually molested female children in the neighborhood?

15 A. Yes.

16 Q. And he also said his father was convicted of a sex
17 crime, is that right?

18 A. Yes.

19 Q. And he also reported to you that his father had
20 abused his sister, is that right?

21 A. I believe so, yes.

22 Q. Okay. Um, you asked Mr. Swarm about his goals for
23 the future, right?

24 A. That's normally what I do, but I'm not seeing it.

25 But, yes.

1 Q. Okay. All right. I'll refer you to Page 4.

2 A. (Reads.) Oh, yes.

3 Q. The second paragraph. "When asked about his plans
4 and goals for the future, Mr. Swarm indicated he'd like
5 to rekindle his relationship with Penny." Is that
6 right?

7 A. Correct.

8 Q. And Penny is the 13-year-old girl that he was
9 involved with years ago?

10 A. Correct.

11 Q. And he also wanted to move to Germany, is that
12 right?

13 A. Yes.

14 Q. And the reason he told you he wanted to move to
15 Germany is because "They have less laws and it's a more
16 free country than the United States. That he could
17 never really be free here now." Did I read that
18 correctly?

19 A. That's what he said.

20 Q. I'm sorry?

21 A. That's what he said, yes.

22 Q. You also asked him about his sexual history?

23 A. Yes.

24 Q. And he reported to you that his only romantic
25 relationship was with 13-year-old Penny, is that

1 correct?

2 A. Correct.

3 Q. And during the course of Mr. Swarm's relationship
4 with Penny, um, she was between the ages of 13 and 16,
5 is that right?

6 A. I believe so, yes.

7 Q. And if I refer you to the bottom, it's actually
8 highlighted on the screen, the bottom of your report,
9 "Penny was much younger in the relationship, aging from
10 13 to 16"?

11 A. Yes.

12 Q. Do you agree that was her age?

13 A. Yes.

14 Q. You also asked Mr. Swarm about his previous
15 convictions, correct?

16 A. I believe so, yes.

17 Q. And he told you, um, he was first convicted of a sex
18 crime involving a step niece in 1994, is that right?

19 A. I'm not seeing it, but that sounds correct, yes.

20 Q. If I could refer you to Page 5 of your report.

21 A. (Reads.)

22 Q. And while I have Page 5 on the screen, I'm not
23 seeing it either. So give me just one moment, please.

24 A. The bottom of the second paragraph: "The respondent
25 indicates he was first convicted of a sex crime for

1 events involving a step-niece named Bobbie."

2 Q. Okay.

3 THE COURT: I think you're going to have to
4 read that more loudly and slowly so it can be reflected
5 accurately on the record.

6 A. On Page 5: "The respondent indicates that he was
7 first convicted of a sex crime for events involving his
8 step-niece named Bobbie."

9 Q. And just while we're talking, be careful, if you
10 might, for the record, not to use any last names of any
11 of these minor children, if you know them.

12 A. Certainly.

13 Q. And in discussing the, um, sex crime involving his
14 step-niece he also emphasized to you that he was
15 partially not responsible, did he not?

16 A. Yes.

17 Q. He said -- and I'm highlighting it on the screen.
18 He emphasized he was partially not responsible because
19 he repeatedly told his step-niece not to spend the night
20 at his home, is that right?

21 A. Yes.

22 Q. And this was the step-niece that his family had
23 asked him to babysit, right?

24 A. I believe so.

25 Q. And she was between the ages of 9 and 11 years old

1 at the time?

2 A. That sounds correct.

3 Q. And he admitted to you that he masturbated while he
4 watched his niece?

5 A. (Reads.) I just want to make sure because I
6 remember there was some disagreement about this issue.
7 Could you cite exactly where that is?

8 Q. Absolutely. In terms of the "9 to 11 years old"
9 with Dr. Mills, I'm referring to Page 7 of your report,
10 um, the second paragraph. The second paragraph, um,
11 that begins "In 1994," about midway through. "The
12 respondent frequently babysat the victim between the
13 ages of 9 and 11."

14 A. Okay. But it's -- at the next-to-last paragraph
15 when it says that he admitted to regularly masturbating
16 while watching his niece, that's actually coming from
17 the Bates Stamp 261, that's not what he necessarily told
18 me.

19 Q. Okay. But in reviewing the records, and I could
20 find Bates Stamp 261, but in reviewing the records you
21 saw an admission by Mr. Swarm that he regularly
22 masturbated while watching his niece?

23 A. Yes.

24 Q. Now, he was also convicted of receipt and possession
25 of child pornography, is that correct?

1 A. Yes.

2 Q. And he was released from prison in September of
3 2005, is that right?

4 A. That sounds correct, yes.

5 Q. And then he violated the conditions of his release
6 by being in the presence of minors, is that right?

7 A. Yes.

8 Q. And he wasn't just in the presence of minors, he
9 actually had physical contact with minors, is that
10 right?

11 A. (Pause.) I'm not seeing that.

12 Q. Okay. I would refer you to -- well, you reviewed a
13 number of records that were produced to you, correct?

14 A. Yes.

15 Q. I'd like to -- in the binder that's on the witness
16 stand in front of you, refer you to Exhibit D.

17 A. (Looks.)

18 THE COURT: Which is Exhibit D, because it's
19 not in evidence?

20 MS. PIEMONTE-STACEY: I'm sorry, your Honor.
21 Exhibit D is the petition to the United States District
22 Court for the Northern District of New York for the
23 warrant or summons for the offender under supervision.

24 MR. WATKINS: I'm going to object, your
25 Honor. I think we started out asking if he admitted to

1 those things, now we're putting in allegations that
2 actually were never admitted to, so.

3 MS. PIEMONTE-STACEY: I'm asking -- the
4 purpose of why I'm asking is Mr. -- the question was
5 about to be if he reviewed his records and saw these
6 admissions and do they factor into his opinion?

7 THE COURT: Well, I don't know that they're in
8 as admissions. That's my point. This is a petition.
9 It could be admitted -- it's like the SORA document. It
10 can be admitted from the fact that it's filed with the
11 court. The statements in the petition are hearsay. You
12 would need to bring the person who prepared the
13 petition, perhaps it's the probation officer, um, to say
14 "I spoke to Mr. Swarm and this is what he said to me."

15 MS. PIEMONTE-STACEY: And it is the probation
16 officer, so may I offer the evidence and subject it to
17 being stricken if the evidence doesn't come out through
18 Probation Officer Pierce?

19 THE COURT: Okay.

20 MR. WATKINS: Your Honor, may I have just a
21 minute to make sure?

22 THE COURT: Yes, this is Exhibit D.

23 MR. WATKINS: Yes, I have it in front of me.
24 I just didn't understand what the government was --
25 well, here we go.

1 (Reads.)

2 THE COURT: Do you want to show us what the
3 pertinent part is?

4 MS. PIEMONTE-STACEY: It's all right if I do?

5 THE COURT: Sure.

6 MS. PIEMONTE-STACEY: Your Honor, I have it
7 highlighted and let me just see here.

8 (Pause.)

9 THE COURT: Okay, the witness doesn't have it
10 now. Um, the -- and this is so Mr. -- he still has it?

11 MS. PIEMONTE-STACEY: Yes.

12 (Pause.)

13 THE COURT: Now, Mr. -- no, I was hoping --
14 then Mr. Watkins and I can see it. But it doesn't
15 matter.

16 MS. PIEMONTE-STACEY: Sorry.

17 MR. WATKINS: Okay, your Honor, I'll withdraw
18 my objection. If she wants to --

19 THE COURT: All right. Go ahead.

20 Q. So, um, Mr. Swarm admitted to you that he had
21 masturbated while watching his niece, is that correct?

22 MS. PIEMONTE-STACEY: I'm sorry. I backed up
23 the question that --

24 THE COURT: No, he said that that wasn't said
25 to him, that he saw it in a document with a particular

1 Bates stamp.

2 MS. PIEMONTE-STACEY: Oh, okay. I apologize,
3 your Honor.

4 THE COURT: Let me put it this way. That's my
5 memory of what he said.

6 Is that correct?

7 THE WITNESS: Yes.

8 MS. PIEMONTE-STACEY: Your Honor, I shouldn't
9 have asked that question.

10 Q. So in your report you indicated that Mr. Swarm was
11 released from prison in September of 2005 and violated
12 the conditions of his release by being in the presence
13 of minors, is that right?

14 A. And in possession of a "Hustler" magazine.

15 Q. Okay. And one of the conditions of his release was
16 that he not be left alone with children, correct?

17 A. Correct.

18 Q. And you had records during your review of this case
19 to see that it wasn't just that he was left alone with
20 children, but he actually had some physical contact with
21 children, is that right?

22 A. I don't remember seeing that.

23 Q. So, um, I now would refer you to Bates Stamp 447,
24 and that's Exhibit D.

25 THE COURT: You want to establish whether he

1 read this?

2 MS. PIEMONTE-STACEY: That was my next
3 question.

4 Q. Did you review this document?

5 A. You know, I reviewed a lot of documents and this
6 sure looked familiar, but I don't specifically remember
7 this one.

8 Q. Okay.

9 MS. PIEMONTE-STACEY: I'll move on, your
10 Honor.

11 THE COURT: Okay.

12 Q. Now, Mr. Swarm told you, during your interview, that
13 he would groom children by letting them know they could
14 talk to him confidentially, is that right?

15 A. Yes.

16 Q. And one of the ways he would attempt to groom the
17 children for potential sex was by impressing them with
18 his physique, correct?

19 A. Correct.

20 Q. And he informed you about seven to nine other past
21 sexual incidents with children over his lifetime,
22 correct?

23 A. Correct.

24 Q. And he told you that Penny was the only one that
25 involved nudity or intimate physical contact?

1 A. That sounds right, correct.

2 Q. And the other incidents involved feeling the breasts
3 of prepubescent children in the neighborhood, is that
4 right?

5 A. Like with their clothes on and things like that,
6 yes.

7 Q. And there were two or three incidents of Mr. Swarm
8 patting the children on their buttocks, is that right?

9 A. Correct.

10 Q. Now, Mr. Swarm has never taken complete
11 responsibility for his actions involving his step-niece,
12 has he?

13 MR. WATKINS: I'm going to object, your Honor.

14 THE COURT: I sustain this to the form of the
15 question.

16 Q. All right. In his interview with you, Mr. Swarm did
17 not take complete responsibility for his actions
18 involving his step-niece, did he?

19 A. I'm not sure what "complete responsibility" means.

20 Q. Did he blame his step-niece for what happened in
21 part?

22 A. Yes.

23 Q. And your record review led you to believe that he
24 has a persistent history of avoiding responsibility for
25 his actions, isn't that right?

1 A. Yes.

2 Q. And he's blamed blood sugar fluctuations for his
3 actions as you've previously testified, right?

4 A. Yes.

5 Q. And he's placed responsibility for molestations on
6 his victims, correct?

7 A. To some degree, yes.

8 Q. And he's claimed that children were the real
9 aggressors to him, right?

10 A. He has in the past, yes.

11 Q. And he said, at one point, he was under the control
12 of his victim. Do you recall that statement?

13 A. I want to make sure it's -- are we talking about
14 something that he had said in the past or to me?

15 Q. Well, let me refer you to Page 8 of your report.

16 A. (Looks.)

17 Q. The paragraph that begins "More importantly." I'm
18 sorry.

19 A. Yes, I see it. Yes. Yes. It was a combination of
20 those statements he's made in the past, that I reviewed,
21 and statements that he made to me.

22 Q. And, um, Mr. Swarm has also argued that he's less
23 culpable for his offenses because he warned the victims
24 and encouraged them to avoid him, right?

25 A. Yes.

1 Q. And you can conclude, to a reasonable degree of
2 certainty, that Mr. Swarm has engaged or attempted to
3 engage in sexually violent conduct or child molestation
4 in that past, is that right?

5 A. Yes.

6 Q. And that's due to Mr. Swarm's admitted past history
7 of child molestation as well as child pornography
8 possession, correct?

9 A. Correct.

10 Q. Now, Mr. Swarm's primary sexual fantasies have
11 always involved prepubescent girls, is that right?

12 A. I believe so.

13 Q. And he told you that he wasn't only attracted to
14 female minors, but he was attracted to those who have
15 been previously molested?

16 A. Yes.

17 Q. And he told you he became addicted to child
18 pornography, didn't he?

19 A. I just want to make sure that he said that to me.
20 Do you know where it is?

21 Q. I believe it's Page 5 of your report, towards the
22 bottom.

23 A. (Reads.) Yeah, that was from something he had said
24 in the records, Bates Stamp 95. He did not say that to
25 me.

1 Q. Okay. So you said, at least on the records, that he
2 had --

3 A. Any time there's a Bates stamp at the end of it,
4 that's what he said in the records, not necessarily what
5 he said to me.

6 Q. Okay. Um, his interests in child pornography
7 involved children down to the age of 9, is that right?

8 A. Um, that's in the records, correct.

9 Q. Okay. And actually they involved children down to
10 the age of 6, didn't they?

11 A. I've not seen that in my report.

12 Q. Okay. I'm going to ask you to turn to Exhibit 37 of
13 the exhibits that have been admitted into evidence.

14 THE COURT: 37?

15 MS. PIEMONTE-STACEY: I'm sorry. It's the
16 presentence investigation report.

17 THE COURT: 27, I think you told me.

18 MS. PIEMONTE-STACEY: Oh, 27. Right, your
19 Honor.

20 Q. Now, do you have 27?

21 A. Yes.

22 Q. Do you recall reviewing this presentence
23 investigation report?

24 A. This looks very familiar, but I don't remember --
25 no, no, no, this actually looks quite familiar.

1 Q. I'm going to show you the page -- it's Page 4 of
2 this report, Bates Page, um, 37.

3 A. Yup.

4 Q. And it talks about the first -- the PSR, it talks
5 about the first child pornography -- it describes the
6 first video that was ordered, correct?

7 A. Yes.

8 Q. And, um, the video was described as involving a
9 child at the age of 6, wasn't it?

10 A. That's correct.

11 Q. And as a whole, of the three videos that Mr. Swarm
12 ordered, the ages of the children were 6, 8, and 9,
13 weren't they?

14 A. Yes.

15 Q. And those videos were children involved in hardcore
16 sexual activity, correct?

17 A. It certainly sounds like it.

18 Q. And you also know that Mr. Swarm had an extensive
19 collection of child porn that included prepubescent
20 children, correct?

21 A. Yes.

22 Q. And between the interview and the records review,
23 that's how you came to your Axis 1 diagnosis of
24 pedophilia sexually attracted to females, not exclusive,
25 correct?

1 A. Correct.

2 Q. And you also diagnosed Mr. Swarm with personality
3 disorder NOS, correct?

4 A. Correct.

5 Q. And, I'm sorry, you have my DSM. So could you just
6 -- for the Court could you go through the elements of a
7 personality disorder NOS?

8 THE COURT: And let us know what page. And
9 then for tomorrow, I'd appreciate it if counsel would
10 make copies of the pages that are being referred to and
11 we'll make them exhibits.

12 MS. PIEMONTE-STACEY: Yes, your Honor.

13 THE COURT: What page?

14 A. (Looks.) Well, the first description of it is on
15 Page 685 of the DSM. It says "Personality" -- do you
16 want me to read it?

17 Q. If you could.

18 A. It says: "Personality disorder not otherwise
19 specified is a category provided for two situations, the
20 individual's personality pattern meets the general
21 criteria for a personality disorder and traits of
22 several different personality disorders are present, but
23 the criteria for any specific personality disorder are
24 not met; or, Number 2, the individual's personality
25 pattern meets the criteria for a personality disorder,

1 but the individual's considered to have a personality
2 disorder that's not included in the classification."

3 So these are things like passive aggressive
4 personality disorder, if there is a formal diagnosis of
5 it.

6 Q. And is there any other section that you referred to
7 in making the diagnosis of personality disorder NOS?

8 A. I don't think I referred to any of the DSM when I
9 made the diagnosis. It's -- in the DSM there's a
10 description of these things. I don't think there's
11 anything more detailed about personality disorder. I'll
12 check it here. (Turns.) On Page 729, there is
13 basically a restatement of that with a little more
14 elaboration. But that's pretty much it.

15 Q. And what are the characteristics of people with
16 personality disorder NOS?

17 A. Well, it depends on which of the other personality
18 disorders' traits that they have, because there's like
19 nine different personality disorders. So it could be a,
20 you know, huge statistical combination of whichever
21 ones. But he essentially had a combination of
22 antisocial, narcissistic and borderline, they call them
23 the Cluster B personality disorders.

24 Q. And what are -- some of the Cluster B personality
25 disorders, are they, um -- are there characteristics

1 associated with them?

2 A. The common theme amongst them is kind of being loud,
3 chaotic and in trouble.

4 Q. Are they deceitful?

5 A. Um, not -- the antisocial is, specifically, but not
6 necessarily on some of the other ones.

7 Q. What about where Mr. Swarm has borderline antisocial
8 personality, would you attribute that trait to --

9 A. They can be quite manipulative. Cluster Bs,
10 manipulation can be part of the common theme.

11 Q. And, um, they also don't like to conform with social
12 norms, is that right?

13 A. Um, not necessarily the case. Some narcissistic
14 personality disorders actually do quite good in
15 conforming, but the antisocial traits tend to lead
16 people to conform less.

17 Q. And, um, a lack of remorse exists in people with
18 antisocial personality disorder, correct?

19 A. Correct.

20 Q. But again Mr. Swarm's diagnosed with personality
21 disorder NOS with these antisocial personality disorder
22 traits, is that right?

23 A. Yes. Technically he doesn't meet the criteria for
24 antisocial personality disorder because he didn't -- to
25 meet actual criteria you have to have essentially a

1 history of juvenile delinquency and he did not have
2 that.

3 Q. Now, the personality disorder is recognized though
4 as a clinical syndrome, correct?

5 A. Yes.

6 Q. And it's Axis 2, I believe you testified, an Axis 2
7 diagnosis?

8 A. Yes.

9 Q. And other mental conditions like pedophilia are on
10 Axis 1, correct?

11 A. Correct.

12 Q. And those are serious -- the Axis 1 diagnoses are
13 serious mental illnesses?

14 A. Not necessarily.

15 Q. Well, I would just refer to Page 18 of your report.

16 A. (Turns.)

17 Q. Looking at the third full paragraph down.

18 A. (Looks.)

19 Q. Um, you talk about how the DSM-IV distinguishes
20 personality disorders on Axis 2 for mental conditions on
21 Axis 1, correct?

22 A. Correct.

23 Q. And then you end -- so Axis 1 is pedophilia,
24 correct?

25 A. Correct.

1 Q. And Axis 2 is this personality disorder NOS,
2 correct?

3 A. Correct.

4 Q. And you conclude that paragraph by saying: "It's
5 consistently recognized that these personality disorders
6 are substantively different than the serious mental
7 illnesses," correct?

8 A. Correct.

9 Q. And the serious mental illnesses are Axis 1?

10 A. Well, that's where I would disagree. It's just the
11 mere -- the mere presence on Axis 1 doesn't mean they're
12 serious, however the inverse is true, serious mental
13 illnesses do go on Axis 1. But there's other Axis 1
14 diagnoses like adjustment disorder or mathematics
15 disorder, they go on Axis 1, but that wouldn't
16 necessarily or automatically mean they're a serious
17 mental illness.

18 Q. And you testified today that, um, pedophilia is a
19 major mental illness disorder, correct?

20 A. It is. It's qualitatively different, but, um,
21 certainly in certain circumstances it can be. It's
22 quite serious in its implications, yes.

23 Q. And pedophilia, as a condition, is one that's
24 unlikely to change over time, is that right?

25 A. That's true.

1 Q. It's a lifetime condition?

2 A. For the most part, yes.

3 Q. Now, in terms of, um, difficulty controlling. You
4 testified that brittle diabetes can impact --

5 THE COURT: Before you go on from personality
6 disorder not otherwise specified, did you, by any
7 chance, read my decision in the **Wilkinson** case? It was
8 sometime ago.

9 THE WITNESS: I think I did, but it's been
10 some time.

11 THE COURT: All right. In **Wilkinson**, I think
12 you testified, but in any event I found that antisocial
13 personality disorder generally, but Mr. Wilkinson's
14 particularly, um, was not volitional in character in the
15 sense that, um -- that because of that diagnosis he was
16 impaired in making good choices, that it just described
17 a person who historically had made illegal choices.
18 That's what I found with regard to antisocial
19 personality disorder.

20 Personality disorder not otherwise specified, does
21 that -- is that, in your opinion, a volitional
22 impairment or is it comparable to what I found
23 antisocial personality disorder to be?

24 THE WITNESS: It's comparable. In fact, I
25 think it's almost synonymous, but it's just that

1 antisocial is kind of a way of describing people who get
2 into trouble with the law, whereas borderline
3 personality disorder tends to describe people who get
4 into trouble with relationships, and narcissistic
5 personality disorder kind of is people that are in
6 trouble with their sense of their entitlement and their
7 way of relating to other people in a kind of an
8 undeserving grandiose way of life. But, yes, it's
9 purely a description as opposed to an illness or any
10 type of etiology.

11 In general it's why the personality disorders are
12 separated off. It's not that they can't be serious in
13 terms of their implications on life, but they -- when
14 they started the DSM process they knew that the
15 personality disorders were different. We couldn't
16 include those on the same level as a major mental
17 illness because, for one thing, it's kind of like saying
18 someone's not responsible for their behavior because
19 they haven't been responsible for their behavior.

20 THE COURT: Okay.

21 MS. PIEMONTE-STACEY: Thank you.

22 Q. Um, when you saw Mr. Swarm the first time, in 2008,
23 he told you that he masturbated to images of
24 prepubescent children, correct?

25 A. I just want to make sure it's something he told me

1 as opposed to what I got from the records. Do you know
2 where that specifically came from?

3 Q. (Looks.) Um, Page 5.

4 A. Yeah, in the third to last paragraph, it says:

5 "There was contradictory information. The records
6 describe him as having -- masturbating about having sex
7 with minors, but also describe him as having that with
8 sexual fantasies with adults. To me he reported that
9 his current sexual fantasies primarily involved
10 imagination of sex with adult actresses."

11 Q. Okay. And so there's contradictory information in
12 the record based on his own self-report, correct?

13 A. Yes, and it may have changed.

14 Q. And it may have changed either way?

15 A. Yes.

16 Q. But regardless of whether it's changing, pedophilia
17 remains a life-long condition, correct?

18 A. Well, for the most part it's like alcoholism, you
19 may be completely clean and sober for 50 years, but you
20 never say you're not an alcoholic.

21 Q. And it's unlikely to change over time, isn't that
22 true?

23 A. It is a high recidivist behavior, yes.

24 Q. In fact, when you're offering an explanation in your
25 report about pedophilia, you say, quote: "Pedophilia is

1 a lifetime condition and the aberrant quality of sexual
2 desire is unlikely to change over time." Is that right?

3 A. Yes.

4 Q. Now, you, um -- I'm sorry. We were talking about
5 brittle diabetes and volitional control, and you had
6 testified that brittle diabetes would affect volitional
7 control, is that right?

8 A. It can.

9 Q. And it can negatively impact volitional control,
10 correct?

11 A. Yes.

12 Q. And, um, when you talk about volitional control,
13 another thing that can affect volitional control are
14 antiandrogens, correct?

15 A. Yes.

16 Q. And antiandrogens are pharmacological treatment?

17 A. Well -- I'm sorry. May I qualify something?

18 Q. Absolutely.

19 A. There's nothing about antiandrogens in themselves
20 that would affect volitional control.

21 Q. How do antiandrogens affect volitional control?

22 A. Well, in this case it would be indirectly, because
23 one of the side effects of these antiandrogen
24 medications is they tend to make diabetes a little
25 worse.

1 Q. And so you opined in your most recent report, to a
2 reasonable degree of professional certainty, that
3 because of this diabetes Mr. Swarm would not be a
4 candidate for pharmacological treatment, is that right?

5 A. No, I don't think he's not a candidate. I think
6 that if he started on this at the beginning, it would be
7 good to do it in a controlled environment, because if
8 he's going to have a real exacerbation of his diabetes
9 with the initiation of treatment, it's probably going to
10 happen in the initiation phase of the treatment.

11 THE COURT: Can I take a step back. I'm
12 sorry. But this --

13 Antiandrogens are part of a pharmacological
14 treatment for pedophilia?

15 MS. PIEMONTE-STACEY: Yes, your Honor.

16 THE COURT: Could you explain that to me, what
17 are antiandrogens and what they do?

18 THE WITNESS: Sure. Antiandrogens are some
19 medications that for -- through different mechanisms,
20 essentially lower the amount of testosterone in the
21 body, and for people who have very high sexuality, um,
22 you can give them these medications and the testosterone
23 level will drop to a point that their -- fairly
24 predictably their sexual behavior will decrease. So
25 it's one of the more common treatments, medication-wise

1 for pedophiles, that you give them like a monthly shot
2 and their testosterone level drops so low that they just
3 don't even have sex with anybody. I mean, they're just
4 not -- they may be interested in sex, but it doesn't
5 happen.

6 Now, the problem is that almost all of these
7 medications that are used to do this can make diabetes
8 worse. So he's kind of in a special class. There's
9 nothing about antiandrogen medications themselves that
10 will affect his volitional control. In fact, it might
11 help him in the sense of being less sexually
12 interested. But paradoxically it might make his
13 diabetes worse and that would not be good for him,
14 because that would have much more a direct effect on his
15 immediate volitional control.

16 If I was going to be treating Mr. Swarm, I would
17 be very reticent to just give him a shot of one of these
18 medications and send him home and say, "I'll see you in
19 two weeks," because that two weeks could be a time where
20 he's already -- his brittle diabetes gets even more
21 brittle.

22 THE COURT: So -- and this is very helpful to
23 me.

24 So these testosterone-lowering antiandrogens would
25 not only be bad for his health generally in the ways

1 that diabetes is bad for one's health, but it would put
2 him at a higher risk of acting on his pedophilia
3 impulses because the extreme blood sugar issues that you
4 described before could occur?

5 THE WITNESS: Yes.

6 THE COURT: Okay. But if his diabetes was
7 closely -- his blood sugar was closely monitored when he
8 was on them, this would lower the testosterone, not
9 diminish his volitional control, because his diabetes
10 was out of control, is that what I should understand?

11 THE WITNESS: Yeah, the ideal situation here
12 would be possibly before he would be released from
13 prison, if he were to get put on one of these
14 antiandrogen medications and then they could adjust his
15 insulin to accommodate for whatever changes are to
16 happen. Because, for example, if he goes on a shot of
17 Depo-Provera and suddenly his sugar starts going up
18 more, well, then they could adjust his insulin to
19 compensate for it and he could leave and get his monthly
20 Depo-Provera shot and not have any problems with it.
21 But to do that as an outpatient would be an extra level
22 of risk.

23 THE COURT: As far as I know from the record,
24 you say the testosterone level gets lowered to the point
25 where somebody may still have -- well, this is getting

1 cleared up.

2 If you take these antiandrogens, does it diminish
3 your desire to have sex with prepubescent children or
4 just your sort of energy or ability to do it?

5 THE WITNESS: Well, this is debated a lot, but
6 for the most part the people still have the fantasies.
7 No medication is going to take away the fantasies. But
8 their general interest in sex goes down and their
9 ability to have sex. For a male, just the ability to
10 get an erection becomes a lot more difficult.

11 THE COURT: And in this case there's no
12 evidence in the record, if you put aside Penny for this
13 purpose, that Mr. Swarm has had any intimate
14 relationship with a prepubescent child. I think he was,
15 you know, revoked for touching clothed young children.
16 Would the antiandrogens reduce the risk that he would
17 touch clothed children or unclothed children again?

18 THE WITNESS: It would decrease his overall
19 sexual interest. So if he touches a child and it is of
20 sexual motivation, that this is somehow arousing to him,
21 yes, that -- it would decrease.

22 THE COURT: Okay. Thank you.

23 Q. And Mr. Swarm's touching of a child, he wasn't
24 revoked -- he touched the child's breasts, correct?

25 A. I believe so.

1 Q. And the buttocks, correct?

2 A. Correct.

3 Q. And, again, over the clothing?

4 MR. WATKINS: I'm going to object here. I'm
5 not sure if that's what the testimony is.

6 THE COURT: Okay. But that's basically my
7 understanding and the lawyers can point me to whatever
8 the evidence in the record is.

9 Q. And so I think I mistakenly said to you that your
10 supplemental report said he was not a candidate for
11 pharmacological treatment, but you actually said he
12 wasn't an ideal candidate for pharmacological treatment,
13 is that right?

14 A. That's correct.

15 Q. And have you explained all the reasons why you think
16 he's not an ideal candidate for pharmacological
17 treatment?

18 A. I think that's the main points.

19 Q. Have you had the opportunity to review the Bureau of
20 Prisons', um, the institution's supplement on
21 pharmacological treatment?

22 A. Yes.

23 Q. And, um, after reviewing the institution's
24 supplement, do you understand that it's something that
25 may be offered within the Bureau of Prisons',

1 pharmacological treatment?

2 A. That's my understanding, yes.

3 Q. As part of the sex offender treatment program?

4 A. Yes.

5 Q. Um, you --

6 THE COURT: I'm sorry to interrupt.

7 But if one were to go on these antiandrogens like
8 Depo-Provera, which somebody should spell for the
9 stenographer, um, how long does it ordinarily take to
10 have an effect?

11 THE WITNESS: A couple of weeks.

12 THE COURT: So if Mr. Swarm were to start them
13 next week, for example, one would expect that in a
14 couple of weeks there would be an effect and in the same
15 period his blood sugar could be monitored?

16 THE WITNESS: Yes. The full effect may take a
17 little longer, but fairly quickly patients will say,
18 "Wow, I can't get an erection now." So it doesn't take
19 months to have a full effect.

20 THE COURT: Okay. We're going to have to stop
21 in about five minutes, so why don't you get yourself to
22 a convenient place.

23 MS. PIEMONTE-STACEY: I will, your Honor.

24 Thank you.

25 Q. To have an effect, the antiandrogen or

1 pharmacological treatment, it does require compliance,
2 correct?

3 A. Absolutely.

4 MS. PIEMONTE-STACEY: Your Honor, I'm at a
5 natural breaking point now.

6 THE COURT: Well, let me ask a question.
7 What's compliance?

8 THE WITNESS: Well, some of the antiandrogen
9 medications are oral pills and some are shots. The oral
10 pill versions actually are probably less toxic to the
11 body and better tolerated, but then you don't know if
12 the person is actually taking the pill, you have to
13 either trust them or have them monitored when they're
14 actually swallowing the pill each day. The advantage of
15 the shot version is that they come in and you know
16 whether or not they got the shot or not.

17 THE COURT: All right. Thank you. Dr. Mills,
18 I'm going to excuse you now. You should come back --
19 you have to come back at 9:00 tomorrow morning. We'll
20 complete your testimony, I expect, tomorrow morning.
21 Thank you.

22 THE WITNESS: Thank you.

23 (Witness leaves.)

24 THE COURT: Do you have a -- I'm not trying to
25 rush you, you've been very helpful, but do you have a

1 sense of about how much longer you're likely to be with
2 Dr. Mills?

3 MS. PIEMONTE-STACEY: I was about two-thirds
4 through, your Honor.

5 THE COURT: All right. And the witnesses
6 after Dr. Mills, remind me again, please, are?

7 MS. CONNOLLY: Michael Pierce, the probation
8 officer, and then, um, if we have time, we'll see if
9 Dr. Ferraro can come in tomorrow, and maybe Ms. Walsh if
10 we can coordinate the logistics on that video. I'm not
11 sure --

12 THE COURT: Well, let's see. Pierce should be
13 here -- and I think I directed you, didn't I --

14 MS. CONNOLLY: Yes, you did.

15 THE COURT: -- to give him the conditions of
16 supervised release -- well, he's got the conditions of
17 supervised release, the doctors' reports and --

18 MS. CONNOLLY: Yes. -- and ask him whether
19 those treatments would be available to --

20 THE COURT: Well, right, including these
21 antiandrogen treatments. I'm going to be interested in
22 that. That's one.

23 MS. CONNOLLY: Okay.

24 THE COURT: Walsh is the person who treated
25 him previously?

1 MS. CONNOLLY: Correct. Well, in conjunction
2 with the supervised release. She was reporting back to
3 probation during that period of his supervised release.

4 THE COURT: And does the SORA relate to her
5 testimony or that's independent?

6 MS. CONNOLLY: It's Pierce. That gets
7 reported back to Pierce.

8 THE COURT: No, but the document that's
9 disputed, the --

10 MS. CONNOLLY: Um --

11 THE COURT: Let me have the document, please.

12 MS. CONNOLLY: It doesn't really come in under
13 either one. We're offering it for judicial notice
14 because there are -- I believe it's Government Exhibit
15 Number --

16 THE COURT: All right, so it doesn't -- that's
17 all I need to know for now.

18 MS. CONNOLLY: Okay.

19 THE COURT: My present understanding is that
20 it doesn't come in, although we may address this
21 tomorrow.

22 MS. CONNOLLY: Okay. And then with respect to
23 Ms. Walsh, the concern we have is in trying to
24 coordinate the video conference, we're not sure -- there
25 are a couple of layers of coordination there. So if we

1 can move it from Wednesday to Tuesday, we could look at
2 that. We're just not sure if --

3 THE COURT: Why, is it planned for Wednesday?

4 MS. CONNOLLY: Yes. I'm sorry, Thursday.
5 Thursday, the 13th.

6 THE COURT: Well, here, why don't you do the
7 following. We'll finish Dr. Mills. We'll deal with
8 Mr. Pierce. Um, and you want to ask Dr. Ferraro about
9 the admissions, right? So --

10 MS. CONNOLLY: Yes, your Honor.

11 THE COURT: So bring Dr. Ferraro tomorrow, um,
12 and I'll delve into this more deeply, but if all you
13 want to get is Mr. Swarm's statements to her, um, those,
14 I expect, will be admissions under 801(d), um, and as I
15 understand it, you're not trying to get her opinion as
16 to whether he's sexually dangerous, is that correct?

17 MS. PIEMONTE-STACEY: That's correct, your
18 Honor, because she actually didn't decide whether he was
19 or wasn't, she was making a risk assessment.

20 THE COURT: Yes.

21 MS. PIEMONTE-STACEY: The part of this I think
22 that would go on her testimony is the fact that she
23 diagnosed him with pedophilia as part of the risk
24 assessment.

25 THE COURT: Well, I don't know that I would

1 let any of that in. There's no dispute that he's got
2 pedophilia.

3 MS. PIEMONTE-STACEY: Right.

4 THE COURT: Okay. So basically I view her as
5 a fact witness, so what did she hear? What did she
6 observe? So if you have Pierce and Ferraro and Mills, I
7 think that will be plenty for tomorrow and if we end
8 early, that's okay.

9 All right. So then you'll keep Walsh for
10 Thursday.

11 MR. WATKINS: Your Honor, as far as the
12 disputed exhibits, there was an Exhibit F, which is the
13 Penny affidavit. As you heard, um, Ms. Stacey kind of
14 touched on it with Mr. Mills. The Court has it and it
15 is what it is.

16 THE COURT: Well, I haven't look at it and we
17 need to stop, but it's an affidavit. As far as I know,
18 the Rules of Evidence apply in this proceeding and
19 unless she were to testify and be subject to cross-
20 examination, the affidavit is hearsay.

21 MR. WATKINS: That is true, the -- as far as
22 putting it into evidence. But I suggested to the
23 government -- and honestly I don't know what the best
24 way to do this is, um, showing it to the experts. The
25 experts have reviewed all kinds of hearsay evidence. In

1 fact, that's really what they do with the records with
2 you.

3 What keeps coming up is this cognitive distortion
4 that Mr. Swarm has when he talks about his relationship
5 with Penny being consensual or willing. It is, um -- I
6 think I need to correct the article of fact. I'm not
7 sure it makes any difference as far as --

8 THE COURT: Well, I'll think about it.
9 I'll -- I'll think about this issue for tomorrow. My
10 clerks will remind me. But I've -- and I'll say this,
11 so you'll remind me, but I don't think I'll forget,
12 because I'm going to issue an order to Dr. Saleh. I
13 have to read the Bureau of Prisons' protocol. I haven't
14 done that. And so --

15 As I understand it, though, these antiandrogens
16 are something different than chemical castration?

17 MR. WATKINS: I think it's shorthand for it.

18 THE COURT: Oh, it is to say that -- if this
19 is what's called "chemical castration," so it's not a
20 permanent alteration, you have to keep taking the shots
21 or taking pills, correct?

22 MR. WATKINS: As I understand it, that's true.

23 THE COURT: All right.

24 MS. PIEMONTE-STACEY: That's true, your Honor.

25 THE COURT: All right. The Court is in recess

1 until 9:00 tomorrow morning.

2 (Adjourned, 1:00 p.m.)

3
4 C E R T I F I C A T E

5
6 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
7 do hereby certify that the foregoing record is a true
8 and accurate transcription of my stenographic notes,
9 before Chief Judge Mark L. Wolf, on Monday, January 10,
10 2011, to the best of my skill and ability.

11
12 /s/ Richard H. Romanow 03-15-11

13 _____
14 RICHARD H. ROMANOW Date